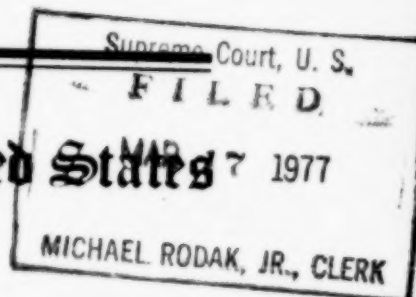


IN THE
Supreme Court of the United States
OCTOBER TERM, 1976



No.

~~76~~-1289

GERALD MARKER, 4365 Ventura Canyon #5, Sherman Oaks, California 91403

MARGUERITE M. SANDERS, 11277 Culver Boulevard, Culver City, California 90230

DR. ANNE PARKS, 18313 Biltmore Street, Detroit, Michigan 48235

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VERNON I. MARDEN, 17801 N.W. 80th Avenue, Hialeah, Florida 33015

DALE RICHARDSON, 7509 State Street, Ralston, Nebraska 68527

(continued)

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

BOB ELAYDO, 214 West Cecil Avenue, Delano Kern County, California

BENJAMIN L. RIGHTER, 17404 Stagg Street, Northbridge, California 91324

ORLAND O. BERGSTROM, 532-21 Mecca Avenue, Tarzana, California 91356

ALINA DUBOIS, 79 North Street, Willimantic, Connecticut 06226

JUDITH TEWKSBURY, 6 Garden Street, Middletown, Connecticut 06457

Petitioners (Intervenors),

—v.—

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its LOCALS 1093, 558 and 25, 8000 East Jefferson Avenue, Detroit, Michigan 48214

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS and its DISTRICT LODGE 1578, 1300 Connecticut Avenue, N.W., Washington, D.C. 20036

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES and its DISTRICT COUNCIL 77, 1155 Fifteenth Street, N.W., Washington, D.C. 20005

AMERICAN FEDERATION OF TEACHERS, and its affiliate, DETROIT FEDERATION OF TEACHERS, 1012 14th Street, N.W., Washington, D.C. 20005

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, ASSOCIATED ACTORS AND ARTISTES OF AMERICA, AFL-CIO, 1350 Avenue of the Americas, New York, New York 10019

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LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO and its LOCAL 383, 905 16th Street, N.W., Washington, D.C. 20006

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, and its DISTRICT 7 and LOCAL 7495, 1925 K Street, N.W., Washington, D.C. 20006

OIL CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO and its LOCAL 3-495, P.O. Box 2812, Denver, Colorado 80201

AMERICAN FEDERATION OF LABOR — CONGRESS OF INDUSTRIAL ORGANIZATIONS, and its COMMITTEE ON POLITICAL EDUCATION, NEW YORK STATE AFL-CIO and PENNSYLVANIA AFL-CIO, 815 16th Street, N.W., Washington, D.C. 20006

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO and its SYSTEM BOARD OF ADJUSTMENT NO. 451 and LOCALS 3001, 3014 and 3049, 6300 River Road, Rosemont, Illinois 60018

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO and its LOCAL 164, 1200 15th Street, N.W., Washington, D.C. 20005

Respondents (Plaintiffs)

and

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., 8316 Arlington Boulevard, Fairfax, Virginia 22030

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and
NATIONAL RIGHT TO WORK COMMITTEE, 8316
Arlington Boulevard, Fairfax, Virginia 22030

Respondents (Defendants)

PETITION FOR A WRIT OF CERTIORARI TO THE
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March 17, 1977

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and

INTERNATIONAL BROTHERHOOD OF ELEC-
TRICAL WORKERS, AFL-CIO and its LOCAL 164,
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Respondents (Plaintiffs)

and

NATIONAL RIGHT TO WORK LEGAL DEFENSE
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(continued)

and

NATIONAL RIGHT TO WORK COMMITTEE, 8316
Arlington Boulevard, Fairfax, Virginia 22030

Respondents (Defendants)

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in their consolidated appeals on December 17, 1976. The judgment affirmed two Orders of the United States District Court for the District of Columbia.

Opinions Below

The *per curiam* judgment, without opinion, of the United States Court of Appeals for the District of Columbia Circuit is unreported, as the judgment was issued pursuant to Rule 8(f) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit. This judgment is set forth in the Appendix to this Petition, p. 1a. Likewise, neither of the Orders of the United States District Court for the District of Columbia are reported. Both Orders are set forth in the Appendix, pp. 3a through 5a.

Statement of Jurisdiction

The judgment of the Court of Appeals was entered on December 17, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. May Petitioners be denied intervention of right, as defendants, on the sole ground that they "are adequately represented [by the original defendants] and should not be permitted to intervene as a matter of right" where

(a) their application for intervention fully complied with Rule 24(a) F.R.C.P.

(b) their Answer includes twenty-two affirmative defenses and a counterclaim not encompassed by the Answer of the original defendants;

(c) Petitioners' interests, as employees, are materially and significantly different from those of the original defendants, as employers; and

(d) The District Court, by Order dated January 26, 1976, has taken as established, vis-a-vis the original defendants, critical allegations made by Respondent-Plaintiffs, which allegations are vigorously denied by Petitioners?

2. May Petitioners be denied intervention of right on the sole ground that they are adequately represented by the original Defendants, where Petitioners and the original Defendants are in potential conflict over the production of lists of contributors, which lists the original Defendants (for constitutional reasons, which Petitioners have no right, let alone standing, to invoke)

have actually refused to produce pursuant to Orders of the District Court?

3. Whether, after granting Petitioners limited permissive intervention, thus binding the Petitioners, as parties, to any judgment to be rendered, the Court may strike the Answer, Affirmative Defenses and Counterclaim of the Petitioners without noting any legal insufficiency thereof?

4. Does the striking of Petitioner's Answer violate the due process clause of the Fifth Amendment to the United States Constitution?

Statutes and Rules Involved

This case involves Rule 24, Federal Rules of Civil Procedure (hereinafter Rule 24 F.R.C.P.), and the Labor-Management Reporting and Disclosure Act (hereinafter LMRDA), especially §101(a)(4) [29 U.S.C. §411(a)(4)], §102 [29 U.S.C. §412], §103 [29 U.S.C. §413] and §603 [29 U.S.C. §523] thereof. The specifically enumerated sections of LMRDA, along with Rule 24, F.R.C.P., are set forth in the Appendix, p. 76 *et seq.*

Statement of the Case

The Respondent-Plaintiffs, twelve national and international unions, and the American Federation of Labor-Congress of Industrial Organizations, filed in the United States District Court for the District of Columbia a Second Amended Complaint against the National Right to Work Legal Defense and Education Foundation, Inc. (hereinafter "Foundation") and the

National Right to Work Committee (hereinafter "Committee")² requesting in two counts, injunctive and declaratory relief and compensatory damages for alleged violations of the Labor-Management Reporting and Disclosure Act (LMRDA), Sections 101(a)(4) and 203(b) [29 U.S.C. §411(a)(4) and 29 U.S.C. §433(b)]. Jurisdiction of the District Court is claimed under 28 U.S.C. §2201 (declaratory relief), 28 U.S.C. §2202 (relief ancillary to declaratory relief), 29 U.S.C. §412 (relief for persons aggrieved by infringement of their rights under LMRDA), 28 U.S.C. §1331 (Federal questions involving more than \$10,000) and 28 U.S.C. §1337 (civil actions arising under Acts of Congress regulating commerce). Count I of the Second Amended Complaint would deny to Petitioners herein their right to receive or continue to receive legal aid from the Foundation, either in the form of money or the services of the Foundation's attorneys.³

Petitioners moved to intervene as defendants on January 9, 1976. The District Court denied Petitioners intervention of right, "it appearing . . . that movants are adequately represented. . . ." The District Court, however, did grant Petitioners permissive intervention, "to afford the movants an opportunity to submit evidence on the limited issue of whether the plaintiffs in the law suits set forth in paragraph ten of the amended

²The Foundation and the Committee are collectively identified herein as the "original defendants." The Complaint was filed on May 1, 1973, the Amended Complaint was filed on May 15, 1973, and the Second Amended Complaint was filed March 9, 1976.

³The Committee was founded and functions as an educational and lobbying organization to oppose compulsory unionism; the Foundation provides legal aid to employees whose human and civil rights are abridged by abuses and illegal conduct arising from compulsory unionism.

complaint were at the time of those actions union-member employees, and to submit briefs on the legal question extant. . . ." Subsequently, upon the Motion of the Respondent-Plaintiffs, the District Court dismissed Petitioners' Answer as being "outside the scope of the permissive intervention granted. . . ." Neither the Courts below nor either Respondent ever questioned the sufficiency of Petitioners' "interest", under Rule 24(a)(2) F.R.C.P.

REASONS FOR GRANTING THE WRIT

I.

SPECIAL NATIONAL IMPORTANCE OF THIS CASE.

This case, which has no precedent, involves as plaintiffs the AFL-CIO and twelve International Unions having members and locals throughout the United States. Their complaint is based on an interpretation of the second proviso of 101(a)(4) LMRDA never before urged upon any court. Thus construed, the proviso has consequential ramifications affecting importantly union members, unions, employers, employees and legal-aid organizations.

Petitioners are typical of thousands of employees seeking court enforcement of their constitutional and statutory rights against unions. They are regarded as "dissidents" by union leaders; and are treated accordingly. Contest between such individuals, bereft of legal aid, and powerful, well-financed unions is either impossible or one-sided. That is why they need legal aid.

Defendants, admittedly *employers*, have presented to the Courts below weighty constitutional and statutory arguments. By their dismissed Answer, Intervenor-Petitioners asked consideration of twenty-two different arguments (some statutory and some constitutional) appropriate to their status as *employees*. None of these twenty-two defenses was made by the original parties in this litigation.

The District Court Orders sought to be reviewed have unavoidable adverse impact or repercussions on: all unions, the interpretation of the LMRDA, availability of courts to dissident employees, constitutional and statutory rights of all employees, and all legal-aid organizations which help employees in cases against unions. As precedents, those Orders cripple Rule 24(a) F.R.C.P.; are out of line with precedents of this Court; deny Petitioners, and thousands like them, meaningful intervention and hearing; permit summary dismissal of intervenors' pleadings; create an unprecedented, useless intervention sans hearing and argument, sans duties or rights; and place upon all intervenors the obligation to suffer in silence flagrant abreption of their rights by an entirely novel "equity action," unknown to statute or law.

Section 101(a)(4) LMRDA, on which Respondent-Plaintiffs rely, has repeated, national application to unions and union members, as the relevant legislative and case reports⁴ show; and as Respondent-Plaintiffs themselves indicate by listing in their complaint, and deprecating as violative of union rights, twenty-seven cases pending in other courts. The Courts below permit

⁴ *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 88 S. Ct. 1717, 20 L.Ed.2d 706 (1968); *Ross v. IBEW*, 93 LRRM 2631 (9th Cir. 1976).

circumvention or subversion of that Section by its second proviso, but the underlying complaint does not name any "interested employer" in the twenty-seven listed cases nor in the instant case.

II.

PETITIONERS ARE INADEQUATELY REPRESENTED BY EXISTING PARTIES.

Denial of intervention of right by the District Court on the sole ground of "adequate representation" was erroneous under applicable cases.⁵ Once Petitioners met the requirements of substantial interest, and risk of impairment of that interest, then

petitioners are entitled to intervene as a matter of right *unless* their interest is adequately represented by existing parties. Thus, the use of the term "unless" in the 1966 amendment puts the burden of providing adequacy of representation on the party opposing intervention. [*TPI Corp. v. Merchandise Mart of S. Carolina*, 61 F.R.D., 684 (D.S.C. 1974).]

The Courts below never even suggested that Petitioners lacked the required *interest* nor that the risk of impairment of that interest by the outcome of this litigation was not real. Nor did Respondents' papers below deny such interest or risk.

⁵ *Trbovich v. United Mine Workers*, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972), *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed.2d 814 (1976), *Smuck v. Hobson*, 132 U.S. App. D.C. 372, 408 F.2d 175 (1969), *Nuesse v. Camp*, 128 U.S. App. D.C. 172, 385 F.2d 694 (1967), *Holmes v. Government of Virgin Islands*, 61 F.R.D. 3, (D.U.I. 1973).

In their application below, Petitioners carried the minimal burden of showing inadequacy of representation. They pointed out Defendants' inability to provide adequate representation under the five criteria adopted by the District Court on Respondents' proposal — criteria which later became the basis for the District Court's Order of January 26, 1976,⁶ and which conclusively disabled Defendants' representation of Petitioners. The latter also submitted below proof of inadequacy of representation by a comparison of Defendants' Answer with Petitioners' Answer, which presented to the Courts below twenty-two valid affirmative defenses not raised by Defendants. Defendants, Petitioners urged below, were *employers*. As such they could not adequately defend the interests of employees like Petitioners. The interests of donees differ from those of donors of legal aid. In a colloquy⁷ with Defendants' attorneys four days before denying intervention of right, Judge Richey expressly conceded that the interests of Defendants and Petitioners "may be" in conflict.

⁶ See Appendix, page 6a. This Order prevents introduction of evidence by Defendants to counter the very portions of the Second Amended Complaint which Petitioners wish to refute.

⁷ On March 4th, 1976, the District Court engaged in the following colloquy with original Defendants' attorney, Thomas Jackson:

* * *

The Court: Well, I am going to say something that perhaps I shouldn't say, but I can't conceive that your office and Mr. Kilcullen, and Whitney North Seymour, and all of the others that you have had participating in this case are not adequate to represent the interests of the defendants [sic].

Mr. Jackson: We have conflicting interests, Your Honor.

The Court: Well, may be you do.

* * *

Clearly, Petitioners met the burden of showing at least that they "may be" inadequately represented under the *Trbovich* case *supra*, 404 U.S. at 538; and see footnote number ten on that page. The courts have applied a liberal test: whether representation "may be" inadequate.⁸

III.

BALANCING EQUITIES.

The other fundamental interests and equities of the parties to be balanced in a determination of Petitioners' right to intervene are the following:

(a) Petitioners' and others' interests in receiving continued legal aid from the Foundation out-balances Respondent-Plaintiffs' interest in preventing such aid to Petitioners and to all intervenors.

(b) Respondent-Plaintiffs' interest in avoiding the substantial issues raised by Petitioners' Answer is out-balanced by Petitioners' "due process" interest in defending themselves adequately against the necessarily hostile Complaint.

(c) Respondent-Plaintiffs' interests in denying to union members and other employees practical access to courts in suits against unions is out-balanced by Petitioners' and others' interests in instituting or maintaining valid actions against labor unions, and in defending themselves against actions brought by unions against them.

⁸See *Trbovich v. United Mine Workers*, *supra*, *Smuck v. Hobson*, *supra*, *Nuesse v. Camp*, *supra*, *Atlantis Dev. Corp. v. United States*, 379 F.2d 818 (5th Cir. 1967), *Kozak v. Wells*, 278 F.2d 104 (8th Cir. 1960), *Ford Motor Co. v. Bisanz Bros.*, 249 F.2d 22 (8th Cir. 1957), *General Motors Corporation v. Burns*, 50 F.R.D. 401 (D. Hawaii 1970).

IV.

CONFLICT WITH SECOND CIRCUIT ESTABLISHED.

The Courts below established a nationally significant conflict between the Second Circuit and the District of Columbia Circuit, on the issue of whether the District Court may summarily strike the answer of a permissive intervenor.

The Second Circuit case of *Stewart-Warner Corporation v. Westinghouse Electric Corporation*, 325 F.2d 822 (2nd Cir. 1963), *cert. den.*, 376 U.S. 944, 84 S. Ct. 800, 11 L.Ed.2d 767 (1964), presented that issue. It held that affirmative defenses and counterclaims may be asserted; that the District Court is "without discretion to deny the intervenor [defendant] the opportunity to advance such claims" [325 F.2d at 827]. The net effect of the judgment of the United States Court of Appeals for the District of Columbia Circuit is to grant to the District Court discretion to strike at will Affirmative defenses and counterclaims.⁹

⁹The striking of the Petitioners' Answer occurred subsequent to the filing of notice of appeal by Petitioners from the March 8, 1976 Order denying them intervention of right and limiting the permissive intervention granted. That appeal deprived the District Court of subject matter jurisdiction over any matter relating to that appeal. Yet the District Court proceeded to strike the Answer of Petitioners without in any way criticizing it. This act of the District Court, affirmed by the Court of Appeals, established a conflict between the District of Columbia Circuit and the Ninth Circuit, per the latter's holding in *Ruby v. Secretary of the United States Navy*, 365 F.2d 385 (9th Cir. 1966), *cert. denied*, 386 U.S. 1001, 87 S. Ct. 1358, 18 L.Ed.2d 442 (1967).

The facts in the *Stewart-Warner* case are the same as in Petitioners' case. There permissive intervention was granted, the answer (including affirmative defenses and counterclaims) was received. Later a motion to dismiss counterclaims and certain affirmative defenses was granted by the District Court. In the instant case, permissive intervention was granted, with disabling limitations, the Answer to the First Amended Complaint (as filed with the Motion to Intervene) was received by the clerk and placed upon the docket. On the day the token permissive intervention was granted, the Court also granted the Plaintiffs' Motion for Leave to File a Second Amended Complaint. Subsequently, Intervenor's Answer to the Second Amended Complaint was filed with the Clerk of the Court and placed upon the docket. Then, Respondents filed their Motion to Strike, which the District Court granted.¹⁰

The Second Circuit decision is the only logical result consistent with Fifth Amendment due process. Where, as here, the Court grants intervention which subjects each Petitioner, as a party, to both the jurisdiction of the Court and the outcome of the litigation, the District Court is "without discretion" to deny Petitioners the ability to defend effectively their interests and rights by censoring the substantive matters they may prove or upon which they may submit legal briefs.¹¹

¹⁰The affirmative defenses and counterclaims in both *Stewart-Warner* and the instant matter were and are inextricably intertwined with the issues raised by the Complaint. Of course, permissive counterclaims are another matter, see *Stewart-Warner*, *supra*, at p. 828.

¹¹The net result of the limitation and restrictions placed upon the permissive intervention granted and the striking of the Answer of your Petitioners would appear to be to limit the Appellants to those defenses and counterclaims which the original Defendants raised. Petitioners have compiled a comparative presentation of the Complaint, the Answer of the original Defendants and the Answer of the Petitioners herein. This compilation may be found in the Appendix, pp. 9a-75a.

Likewise, the District Court is without discretion to strike a counterclaim, where, as here, a separate cause of action may be filed by the Intervenor against the unions.

V.

DISMISSAL OF PETITIONERS' ANSWER VIOLATED DUE PROCESS UNDER THE FIFTH AMENDMENT.

The disabling permissive intervention allowed to Petitioners by the Courts below binds them under a possible judgment in this case. Yet it leaves them without any voice during the judicial process which produces such a judgment. This Court has condemned such a procedure many times as *Matthews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976) (and the cases cited therein) shows:

[A]s has been implicit in our prior decisions, e.g.*** [citing cases] *** the interest of an individual in continued receipt of *** benefits is a statutorily created "property" interest protected by the Fifth Amendment. [Citing cases] ***

This Court consistently has held some form of hearing is required before an individual is finally deprived of a property interest. *** [citing cases] *** The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." [Citing cases] ***. [424 U.S. at 332, 96 S. Ct. at 901-902; 47 L.Ed.2d at 31-32.]

The right of Petitioners and of others similarly situated to receive legal aid and of legal-aid groups to give that aid was recognized long before the second proviso of Section 104(a)(4) LMRDA became law.

Sections 103 and 603 of that statute perpetuate such long-recognized property rights and privileges.¹²

What the Constitution does under the Fourteenth Amendment *vis-vis* the States,¹³ it does *a fortiori*, under the Fifth Amendment, to protect due process in federal courts. It is not due process to tell Petitioners that they are entitled to no opportunity to present arguments and evidence to prove their defenses. *Paul v. Davis, supra*, says:

We think that the italicized language in the last sentence quoted [from *Wisconsin v. Constantineau*, 400 U.S. 433, at 437, 91 S. Ct. 507 at 510, 27 L.Ed.2d 515 at 519 (1971)] "because of what the government is doing to him," referred to the fact that the governmental action taken in that case deprived the individual of a right previously held under state law. . . . [424 U.S. at 708, 96 S. Ct. at 1164, 47 L.Ed.2d at 418.]

In *Paul, supra*, the right to purchase liquor was involved. That right pales in comparison to the right to practicable access to the courts. If the decisions of the District Court to deny intervention of right and to strike the Answer of Petitioners are upheld, the Petitioners will be shorn of a meaningful hearing. This further increases the risk that their right to go to the courts will be impaired.

¹²See *Meyer v. Nebraska*, 262, U.S. 390, 399, 43 S. Ct. 625, 626, 67 L.Ed. 1042, 1045 (1923).

¹³*Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L.Ed.2d 405 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972); *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L.Ed.2d 90 (1971).

Among Petitioners' twenty-two affirmative defenses, (all of which are set forth in the Appendix, pp. 43a-66a) several of the more important ones, which Petitioners have been barred from presenting, highlight the inherent lack of due process:

(i) No statute or other law authorized the "equity action" set forth in the instant Complaint. In allowing the alleged "equity action," the Court below has patently violated the principles laid down by this Court in *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 280, 45 L.Ed.2d (1975); *Securities Investor Corporation v. Barbour*, 421 U.S. 412, 95 S. Ct. 1733, 44 L.Ed.2d 263 (1975); and *National R.R. Passenger Corp v. National Association of R.R. Passengers*, 414 U.S. 453, 94 S. Ct. 690, 38 L.Ed.2d 646 (1974), rehearing denied, 415 U.S. 952, 94 S. Ct. 1478, 39 L.Ed.2d 568 (1974).

Nothing in Title I LMRDA intimates a Congressional intent to permit an "equity action," such as the District Court approved. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al. v. National Right to Work Legal Defense and Education Foundation, Inc., et al.*, 336 F. Supp. 46 (D.D.C. 1974). More than seventy times in the legislative history of Section 101(a)(4), members of the Senate and the House of Representatives referred to actions *by union members* against unions. Not one Congressman nor one Senator ever referred to an action *by a union* under that Section. When the two sentences of Section 102 LMRDA are read together, as they must be, they clearly refer (by use of the words "such action") to an action *by a union member* against his union, and not to an action *by a union*.

(ii) The Complaint seeks to prevent Foundation and Committee from giving legal aid upon the sole basis of the second proviso in Section 101(a)(4) LMRDA. But

the constitutional rights protected by that Section are not subject to limitation by *statute*. Respondents use that proviso to prevent Petitioners and others from getting before the courts, in violation of the Fifth Amendment of the Constitution. The Complaint contains no *fact* allegation derogating from Foundation's status and function as a genuine legal-aid organization. Paragraph "10" of the Complaint lists and describes twenty-five actions in which the Foundation has given legal aid. Every allegation in the Complaint of purported *fact* (as distinguished from *conclusions of law* or *conclusions of fact*), is protected by the First Amendment. Even Respondents' *conclusions of fact* are legally innocuous, because they refer only to previously alleged items of Defendants' *legitimate* activity by use of phrases like: (i) "in those activities" (referring to the twenty-one legally innocuous allegations previously alleged) and (ii) "in promoting such suits" (referring to the twenty-five lawful suits listed in the Complaint). See *NLRB v. Industrial Union of Marine & Shipbuilding Workers, supra*. Two further illustrations of the necessarily involved lack of due process are set forth in the footnote below.¹⁴

¹⁴(i) By alleging the existence of other lawsuits, as a predicate to their requested relief, Respondent-Plaintiffs are in effect asking the District Court below to exercise an undefined form of judicial review of twenty-seven actions pending in other courts. Respondent-Plaintiffs list these cases in their complaint because of two *conclusions of fact* they allege:

a. "[T]he Foundation (aided by the Committee) has financed, encouraged, managed and participated (other than as a party) in suits...by employees and members of labor organizations which challenge their financial obligations to the union which is their collective bargaining representative." Appendix, pp. 30a-31a. Obviously, the merits of those suits must be decided in the courts where the actions are pending. If they are found to be meritorious, why do Respondents complain? If

(continued)

Conclusion

For the reasons set forth hereinabove, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(footnote continued from preceding page)

not, are they asking the District Court herein to review or re-try them?

b. "In those activities the Foundation has been acting as an agent and conduit for employers interested in promoting such suits..." Appendix, p. 31a. Was this brought out in those suits? If so, what were the rulings by the other Courts? If not, why not? Do Respondents now ask the District Court to open those cases in other courts to "prove" in Washington, D.C. what was relevant to twenty-seven cases in other courts?

Those two *conclusions of fact* imply the unprecedented contention that the District Court should investigate and review these two facets of the twenty-seven *listed* Foundation-aided cases. It is a matter of nationwide importance that Respondent-Plaintiffs' pretention to such unorthodox reievw of litigations pending in other courts by the District Court for the District of Columbia should be checked by this Court.

(ii) The first cause of action set forth in the Complaint adds up to an accusation that the original Defendants are unlawfully interfering in the *internal affairs and disputes* of unions. This "equity action" amounts to assertion of a series of "labor disputes" (between Respondent-Plaintiffs and Respondent-Defendants) within the meaning of the Norris-LaGuardia Act. This fact alone would prevent the District Court from issuing the injunction Respondent-Plaintiffs seek; and it shows that only the N.L.R.B. has jurisdiction over such disputes.

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March 17, 1977

IN THE
Supreme Court of the United States U. S.

OCTOBER TERM, 1976

FILED

MAR 17 1977

No.

MICHAEL RODAK, JR., CLERK

76-1289

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(continued)

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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necticut 06226

JUDITH TEWKSBURY, 6 Garden Street, Middletown,
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Petitioners (Intervenors),

—v.—

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA and its LOCALS 1093,
558 and 25, 8000 East Jefferson Avenue, Detroit,
Michigan 48214

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS and its DISTRICT
LODGE 1578, 1300 Connecticut Avenue, N.W.,
Washington, D.C. 20036

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES and its DISTRICT
COUNCIL 77, 1155 Fifteenth Street, N.W., Washing-
ton, D.C. 20005

AMERICAN FEDERATION OF TEACHERS, and its
affiliate, DETROIT FEDERATION OF TEACHERS,
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AMERICAN FEDERATION OF TELEVISION AND
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(continued)

UNITED FARM WORKERS NATIONAL UNION,
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SHEET METAL WORKERS INTERNATIONAL ASSO-
CIATION, AFL-CIO and its LOCAL 146, 1750 New
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LABORERS' INTERNATIONAL UNION OF NORTH
AMERICA, AFL-CIO and its LOCAL 383, 905 16th
Street, N.W., Washington, D.C. 20006

COMMUNICATIONS WORKERS OF AMERICA, AFL-
CIO, and its DISTRICT 7 and LOCAL 7495, 1925 K
Street, N.W., Washington, D.C. 20006

OIL CHEMICAL AND ATOMIC WORKERS INTER-
NATIONAL UNION, AFL-CIO and its LOCAL
3-495, P.O. Box 2812, Denver, Colorado 80201

AMERICAN FEDERATION OF LABOR — CONGRESS
OF INDUSTRIAL ORGANIZATIONS, and its COM-
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20006

BROTHERHOOD OF RAILWAY, AIRLINE AND
STEAMSHIP CLERKS, FREIGHT HANDLERS, EX-
PRESS AND STATION EMPLOYEES, AFL-CIO and
its SYSTEM BOARD OF ADJUSTMENT No. 451
and LOCALS 3001, 3014 and 3049, 6300 River
Road, Rosemont, Illinois 60018

and

INTERNATIONAL BROTHERHOOD OF ELEC-
TRICAL WORKERS, AFL-CIO and its LOCAL 164,
1200 15th Street, N.W., Washington, D.C. 20005

Respondents (Plaintiffs)

and

NATIONAL RIGHT TO WORK LEGAL DEFENSE
AND EDUCATION FOUNDATION, INC., 8316
Arlington Boulevard, Fairfax, Virginia 22030

(continued)

and

NATIONAL RIGHT TO WORK COMMITTEE, 8316
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Respondents (Defendants)

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March 17, 1977

(i)

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

(ii)

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Order of the United States Court of Appeals
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Filed December 17, 1976

NOT TO BE PUBLISHED — SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1976
CIV. No. 839-73

No. 76-1346

INTERNATIONAL UNION, UNITED AUTOMOBILE
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA AND ITS LOCALS 1093,
558 and 25, *et al.*,

v.

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND
EDUCATION FOUNDATION, INC., *et al.*,

and

GERALD MARKER, *et al.*,

Appellants.

No. 76-1530

2a

INTERNATIONAL UNION, UNITED AUTOMOBILE
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, *et al.*,

v.

NATIONAL RIGHT TO WORK LEGAL DEFENSE
FOUNDATION, INC., *et al.*,

and

GERALD MARKER, *et al.*,

Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before:

BAZELON, *Chief Judge*,
LEVENTHAL AND MACKINNON, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from in these causes are hereby affirmed.

Per Curiam

For the Court
/s/George A. Fisher
GEORGE A. FISHER
Clerk

3a

Order of Charles R. Richey, U.S.D.J.,
Filed March 8, 1976

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL ACTION 839-73

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, *et al.*,

Plaintiffs,

v.

NATIONAL RIGHT TO WORK LEGAL DEFENSE
AND EDUCATION FOUNDATION, INC., *et al.*,

Defendants.

ORDER

Upon consideration of the motion of Gerald Marker, *et al.*, to intervene in this action, the points and authorities in support thereof and in opposition thereto, and it appearing to the Court that movants are adequately represented and should not be permitted to intervene as a matter of right, but it further appearing to the Court that permissive intervention should be allowed to afford the movants an opportunity to submit evidence on the limited issue of whether the plaintiffs in the lawsuits set forth in paragraph ten of

the amended complaint were at the time of those actions union-member employees, and to submit briefs on the legal question extant, it is, by the Court, this 8th day of March, 1976,

ORDERED, that the motion to intervene as of right of Gerald Marker, et al., be, and the same hereby is, denied; and it is

FURTHER ORDERED, that the movants, Gerald Marker, et al., are hereby permitted to intervene permissively and for the limited purpose of submitting evidence on the question of whether the plaintiffs set forth in paragraph ten of the amended complaint were at the time of those actions union-member employees, and for the purpose of submitting briefs on the legal questions extant.

/s/Charles R. Richey
Charles R. Richey
United States District Judge

Order of Charles R. Richey, U.S.D.J.,
Filed April 30, 1976

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL ACTION 839-73

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, *et al.*,

Plaintiffs,

v.

NATIONAL RIGHT TO WORK LEGAL DEFENSE
AND EDUCATION FOUNDATION, INC., *et al.*,

Defendants.

ORDER

Upon consideration of plaintiffs' motion to strike answer of intervenors to second amended complaint, and the points and authorities in support thereof and in opposition thereto, and it appearing to the Court that said answer of intervenors to second amended complaint is outside the scope of the permissive intervention granted by this Court on March 8, 1976, it is, by the Court, this 28th day of April, 1976,

ORDERED, that the plaintiffs motion to strike the answer of intervenors to the second amended complaint be, and the same hereby is, granted.

/s/Charles R. Richey
Charles R. Richey
United States District Judge

Order of Charles R. Richey, U.S.D.J.,
Filed January 26, 1976

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL ACTION 839-73

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, *et al.*,
Plaintiffs,

v.

NATIONAL RIGHT TO WORK LEGAL DEFENSE
AND EDUCATION FOUNDATION, INC., *et al.*,
Defendants.

ORDER

In the Memorandum Opinion and Order of December 19, 1975, this Court ordered the Defendants to comply with this Court's Order of June 5, 1974, concerning "Set Number II of Interrogatories by Plaintiffs, to Defendants." In the December 19th Order, this Court held Plaintiffs' motion for Rule 37 sanctions sub judice pending compliance by the Defendants with the June 5th Order. This Court modified the June 5th Order on January 15, 1976, and in so doing, ordered the Defendants to comply with the June 5th Order on or before the close of business on or before January 19, 1976. The Defendants to this date have not complied with the Orders of this Court, and the Court finds Defendants. non-compliance to be willful. Therefore, the Court will

grant Plaintiffs' motion for Rule 37(b) (2) (A) sanctions, and the "matter regarding" the Orders of the Court shall be deemed to be established. In this regard, the Court will take as established all of those facts which, without the list of contributors, it would be unjust and unfair to require the Plaintiffs to prove. This is dictated by both Rule 37 itself and principles of due process. See *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 29 S. Ct. 270, 380 (1909).

On the basis of the foregoing, it is, by the Court, this 26th Day of January, 1976,

ORDERED, that the Plaintiffs' motion for Rule 37 sanctions by, and the same hereby is, granted; and it is

FURTHER ORDERED, that it shall be deemed taken as established for the purposes of this action that among financial contributors to the Defendant Foundation are a substantial number of employers who (1) have contracts or other relationships with some of the Plaintiff unions herein; (2) are in the same lines of business in which some of the Plaintiff unions herein engage in organization; (3) have union security agreements of their own whose validity or operation may be affected by suits which the Defendant Foundation is supporting; (4) have contributed to the antiunion activities of the Defendant Committee; and (5) have in other ways manifested their opposition to organized labor; and it is

FURTHER ORDERED, that the facts alleged in paragraphs ten (10) and twelve (12) of the amended complaint shall be taken as established for purposes of this litigation; and it is

FURTHER ORDERED, that is shall be taken as established for purposes of this litigation that the "financial contributors" designated in the second ordered paragraph above have contributed monies to the Defendant

Foundation and that said monies have been given by the Foundation to the Plaintiffs in the lawsuits set forth in paragraph ten (10) of the amended complaint for the purposes of financing the encouraging said litigation, and that said "financial contributors" are employers who have a concrete interest and would be affected by the aforesaid law suits set forth in paragraph ten (10) of the amended complaint; and it is

FURTHER ORDERED, that upon proof of compliance with the Orders of the Court of June 5, 1974; December 19, 1975; and January 15, 1976, this Court will consider a motion to vacate this Order; and it is

FURTHER ORDERED, that the Defendants shall appear before this Court at 10:00 o'clock a.m. in Courtroom 11, United States Courthouse, Washington, D.C. on the 20th day of February, 1976, to show cause why summary judgment on Count I of the amended complaint should not be entered in favor of the Plaintiffs; see *McMullen v. Travelers Ins. Co.*, 278 F2d 834 (9th Cir.), *cert. denied*, 364 U.S. 867 (1960); and it is

FURTHER ORDERED, that the defendants shall, unless shown to be unjust, pay the reasonable expenses, including attorneys' fees, incurred to date and through February 20, 1976 in relation to the sanctions herein imposed, and the Plaintiffs shall submit to the Court an itemization of costs and fees so that the Court can make a determination as to reasonableness, said submission to be filed with the Clerk of the Court within five (5) days after the show cause hearing referred to above.

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

**Comparative Presentation of the Pleadings
Set Forth in Second Amended Complaint,
The Answer of Original Defendants and the
Answer of Intervenors¹**

The Second Amended Complaint:

1. This is an action for declaratory and injunctive relief to enforce Section 101(a)(4) and Section 203(b) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. §411(a)(4), and 29 U.S.C. §433(b). This Court has jurisdiction of this action under 29 U.S.C. §412; 28 U.S.C. §§1331 and 1337; and 28 U.S.C. §§2201 and 2202. The amount in controversy in this suit exceeds, exclusive of interest and costs, the amount of \$50,000.

The Answer of the Original Defendants:

1. Deny each and every allegation contained in Paragraph 1 except admit Plaintiffs purport to bring this action to enforce §101(a)(4) and 203(b) of the Labor Management Reporting and Disclosure Act of 1959 ("Act"), 29 U.S.C. §411(a)(4) and 433(b).

¹With the exception of the titles found in the pleadings and the names of cases, the materials set forth in italics, hereinbelow, indicate the modifications and changes found between the First and Second Amended Complaints. Minor typographical errors in the originals of these documents have been cured in this presentation.

The Answer of the Intervenor:

1. DENY that the actions set forth in the Amended Complaint enforce, or tend to enforce, or are authorized by any part of, the Labor-Management Reporting and Disclosure Act of 1959 (hereinafter "LMRDA").

The Second Amended Complaint:

2. The Plaintiffs in the first cause of action (§§ 9-15 below), each of which is a "labor organization" within the meaning of Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 (hereafter referred to as "the Act"), are the following labor unions: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America-UAW, and its Locals 1089, 558 and 25; International Association of Machinists and Aerospace Workers and its District 1578; American Federation of State, County and Municipal Employees and its District Council 77; American Federation of Television and Radio Artists, Associated Actors and Artistes of America, AFL-CIO, United Farm Workers National Union, AFL-CIO; Sheet Metal Workers International Association, AFL-CIO; and its Local 146; Laborers' International Union of North America, AFL-CIO and its Local 383; Communications Workers of America, AFL-CIO, and its District 7 and Local 7495; Oil, Chemical and Atomic Workers International Union, AFL-CIO and its Local 3-495; *American Federation of Labor-Congress of Industrial Organizations, its Committee on Political Education, New York State AFL-CIO and Pennsylvania AFL-CIO; Brotherhood of Railway,*

Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO and its System Board of Adjustment No. 451 and Locals 3001, 3014 and 3049; International Brotherhood of Electrical Workers, AFL-CIO and its Local 164. In addition to the above unions, the Plaintiffs in the second cause of action (§§ 16-21 below) include the American Federation of Teachers, and its affiliate, the Detroit Federation of Teachers.

The Answer of the Original Defendants:

2. Deny each and every allegation contained in Paragraph 2 except admit that Plaintiffs purport to be labor organizations.

The Answer of the Intervenor:

2. ADMIT, as to paragraph of the Amended Complaint numbered "2", that Plaintiffs claim to be "labor organizations" (as those words are defined by the LMRDA) and that in certain limited respects Plaintiffs do function as "labor organizations". But,

DENY that Defendants are "labor organizations" within the statutory definition [Sec. 3(i) LMRDA] insofar as they operate extensively in areas outside of collective bargaining, employee representation and grievance processing as exemplified by but not limited to activities of the Plaintiffs as political lobbies; as purveyors of social and economic ideologies; as financiers of political candidates; as propagandists for many idiosyncratic legal, economic, social and political points

of view and self-interests; as suppliers of socio-economic services and arguments for their own special benefit; as publishers of political and special-pleading newspapers, newsletters, journals, periodicals, magazines, leaflets and publications to promote compulsory unionism; as activists for higher and higher salaries and pensions for Union officers; and as suppressors, directly or indirectly, of intra-union dissent; and as fomenters of political strikes.

The Second Amended Complaint:

3. The Defendant National Right to Work Legal Defense and Education Foundation, Inc. (hereinafter "the Foundation"), is chartered in the District of Columbia as a non-profit corporation and does business in this jurisdiction. Its principal place of business is at *8360 Arlington Boulevard, Fairfax, Virginia*.

4. The Defendant National Right to Work Committee (hereafter "the Committee") is chartered in the District of Columbia as a nonprofit corporation and does business in this jurisdiction. Its principal place of business is at *8360 Arlington Boulevard, Fairfax, Virginia*.

The Answer of the Original Defendants:

3. Admit the allegations contained in Paragraphs 3 and 4.

The Answer of the Intervenor:

3. ADMIT the allegations of paragraphs numbered "3" and "4" of said Amended Complaint.

The Second Amended Complaint:

5. The Committee, which has been in existence for nearly twenty years, is an organization chiefly funded by employers and dedicated to opposing various forms of union security pursuant to which employees give financial support to their collective bargaining representatives. As described in the tax exemption application filed in 1970 by the Foundation (see Attachment A), the "primary purpose of the National Right to Work Committee since its beginning in 1955 has been to promote voluntary unionism" and to oppose "compulsory unionism, whereby workers are compelled to join and pay dues to labor unions as a condition of employment." In the furtherance of its objective the Committee is regularly engaged in a wide range of propaganda, advertising, and lobbying activities in opposition to union security provisions in collective bargaining agreements. See Attachments B-1-B-5.

The Answer of the Original Defendants:

4. Deny each and every allegation contained in Paragraph 5 except admit that the Foundation filed an application for a tax exemption and respectfully refer the Court to said application for the terms thereof.

The Answer of the Intervenor:

4. DENY KNOWLEDGE OR INFORMATION sufficient to form a belief as to each and every factual allegation contained in the paragraph of said Amended Complaint numbered "5". But,

DENY the portions of said paragraph which imply, allege, tend to allege or to intimate:

(i) That opposition on principle to various forms of Union security and to various forms of compulsory unionism violates any Federal or State law or statute, whether that opposition is manifested by defendants, by employees or by employers;

(ii) That the "primary purpose" and "objective" attributed to Defendants in said paragraph numbered "5" of the Amended Complaint are unlawful under applicable laws or statutes; and

(iii) That they are outside the protection of the First Amendment to the United States Constitution.

The Second Amended Complaint:

6. The Foundation was established by the Committee in 1968 to further the objective of defeating union security agreements by litigation. A resolution of January 26, 1968 by the Board of Directors of the Committee (see Attachment C) directed the creation of "a separate corporate organization" to promote the objective by "financial assistance to defray the expense of legal actions brought by workers for the purpose of protecting their rights against compulsory unionism." The Foundation was created as a separate entity so as to obtain tax-deductible support for litigation, under

§ 501(c)(3) of the Internal Revenue Code (25 U.S.C. § 501(c)(3)) (see Attachment A, p. 1).

The Answer of the Original Defendants:

5. Deny each and every allegation contained in Paragraph 6 except admit that the Foundation was established in 1968 pursuant to a resolution adopted by the Board of Directors of the Committee and respectfully refer the Court to said resolution for the terms thereof.

The Answer of the Intervenor:

5. DENY KNOWLEDGE OR INFORMATION sufficient to form a belief as to the factual allegations contained in paragraph numbered "6" of the said Amended Complaint. But,

DENY the portions of said paragraph which imply, allege, tend to allege or intimate that the "objectives" attributed to Defendants by said paragraph numbered "6" violate any statute or law and are outside the protection of the First Amendment to the United States Constitution.

The Second Amended Complaint:

7. Since its establishment the Foundation has been directed and controlled in its objectives and operations by the Committee. Such direction and control is assured by the fact that the Executive Vice President of

the Foundation is also the Executive Vice President of the Committee, and by the fact that twelve of the thirteen Trustees of the Foundation are also members of the Board of Directors of the Committee. See Attachments D and E.

The Answer of the Original Defendants:

6. Deny each and every allegation contained in Paragraph 7.

The Answer of the Intervenors:

6. DENY KNOWLEDGE OR INFORMATION sufficient to form a belief as to the factual allegations contained in paragraph numbered "7" of the Amended Complaint. But,

DENY the portions of said paragraph which imply, allege, tend to allege or to intimate that the objectives and operations of Defendants are and have been at any time unlawful and are outside the protection of the First Amendment to the United States Constitution.

The Second Amended Complaint:

8. The literature, propaganda and lobbying of the Committee, and the litigation financed, sponsored and managed by the Foundation, are couched in broad terms of human and constitutional rights of employees to refrain from supporting labor union activities; but their actual purpose in furtherance of the parochial

interests of the employers who are the financial backers of the Committee and the Foundation is to weaken the strength of labor unions vis-a-vis these and other employers whose workers they have organized or seek to organize. The Foundation and the Committee direct most of their fund-raising activities toward employers interested in weakening or eliminating union security arrangements. The Foundation directly solicits employer contributions with the representation that contributions to the Foundation qualify as deductions for tax purposes. See Attachments E and F. The great preponderance of the financial support for the operations of the Foundation comes directly or indirectly from employers seeking to erode the strength of labor unions by weakening or eliminating union security arrangements.

The Answer of the Original Defendants:

7. Deny each and every allegation contained in Paragraph 8 except admit that the Foundation solicits contributions from the general public which includes persons or firms which employ others.

The Answer of the Intervenors:

7. DENY KNOWLEDGE OR INFORMATION sufficient to form a belief as to the factual allegations contained in paragraph numbered "8" of the Amended Complaint. But,

DENY the portions of said paragraph which imply, allege, tend to allege or to intimate:

(i) That the literature, propaganda and lobbying attributed to Defendants by said paragraph "8" of the Amended Complaint are unlawful or are unprotected by the First Amendment to the United States Constitution;

(ii) That the "actual purpose," "furtherance," and fundraising activities and solicitations attributed to Defendants are unlawful and are unprotected by the First Amendment to the United States Constitution; and

(iii) That financial support for the operations of Defendant Foundation by employers (whether said operations erode the strength of labor unions, whether they weaken or eliminate union security arrangements or not) is unlawful and is unprotected by the First Amendment to the United States Constitution.

The Second Amended Complaint:

FIRST CAUSE OF ACTION — Section 101(a)(4)

9. Section 101(a)(4) of the Act states that "no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party" an "action in any court" instituted by a labor organization member. Since its inception, the Foundation has been principally engaged in furthering the interests of its employer contributors by encouraging, assisting, fomenting, sponsoring, initiating, financing, managing and providing legal counsel in antiunion suits instituted by employees and union members against labor organizations and others. See Attachments E, F, G and H. The suits challenge a variety of labor organization contracts, rules and

actions; many are particularly directed against compulsory union security and financial support payments by employees to the unions which represent them in collective bargaining. Approximately twenty such Foundation-sponsored suits by employees and union members have been filed or are currently pending in various state and federal courts, and in view of the increasing financial resources of the Foundation the number of such suits is certain to grow. In its first year of operation for which the Foundation filed a Federal Tax Return (1969) it showed an annual income of \$204,000. In 1970 its reported income rose to \$1,326,000. During 1971 the income of the Foundation available to support its litigation-financing activities rose to \$1,698,445. See Attachment I.

The Answer of the Original Defendants:

8. Deny each and every allegation contained in Paragraph 9 except admit the existence of §101(a)(4) of the Act and further admit that the Foundation has filed Federal Tax Returns but respectfully refer the Court to said statute and tax returns for the terms and substance thereof.

The Answer of the Intervenors:

8. DENY KNOWLEDGE OR INFORMATION sufficient to form a belief as to the factual allegations contained in paragraph numbered "9" of the Amended Complaint. But,

DENY the portions of said paragraph which imply, allege, tend to allege or to intimate:

(i) That "encouraging, assisting, fomenting, sponsoring, initiating, financing, managing and providing legal counsel in antiunion suits instituted by employees and union members against [unnamed] labor organizations and others" are violative of any law or statute and are unprotected by Article III of the United States Constitution and by the First, Fifth and Seventh Amendments to the said Constitution (which give to employees and union members, among others, a right of access to the Courts);

(ii) That, in any event, the merits or demerits of such allegedly "anti-union suits instituted by employees and union members" are matters for determination in any Court other than the respective Courts in which such suits are, were or will be pending;

(iii) That this Court has power or jurisdiction collaterally to review or to render any judgment as to such merits or demerits;

(iv) That suits in other Courts which challenge "a variety of labor organization contracts, rules and action" are subject to review or decision by this Court in the instant case;

(v) That suits (pending in other Courts) which are "particularly directed against compulsory union security and financial support payments by employees to unions which represent them in collective bargaining" (as stated in paragraph numbered "9" of the Amended Complaint) are violative of any law or statute, are unprotected by the United States Constitution and statutes insofar as they guarantee the right of access to Courts; and,

(vi) That this Court has jurisdiction or power to review or to rule upon any issue, actual or potential, arising in any of the "twenty such Foundation-

sponsored suits by employees and union members" mentioned in said paragraph "9" of the Amended Complaint.

The Second Amended Complaint:

10. Among the aforesaid suits financed and supported by the Foundation since its organization are the following:

(1) *Reid, et al. v. McDonnell Douglas Corp. et al.*, N.D., Okla., CA No. 67-0-224, filed September 1967. Plaintiffs are employed at the McDonnell Douglas Corporation in Tulsa, Oklahoma and sue McDonnell Douglas and the United Automobile Workers (UAW) Local 1093. In their Complaint Plaintiffs challenge the legality of the dues-support obligations under the union security agreement between the Company and the Union, particularly because of political expenditures by the Union. Defendants prevailed on summary judgment in District Court and the case is pending on appeal before United States Court of Appeals for the Tenth Circuit.

(2) *McNamara, et al. v. Johnston, et al.*, N.D. Ill., CA No. 71C654, filed March 1971. Plaintiffs are employed at General Motors Corporation in Willow Springs, Illinois, and sue officials of the UAW. In their Complaint Plaintiffs challenge the expenditure for political purposes of dues collected under the union security agreement between the Company and the Union. The case is pending in District Court.

(3) *Gabauer, et al. v. Woodcock, et al.*, E.D. Mo. CA No. 72C180(A), filed March 1972. Plaintiffs are employed at the General Motors Chevrolet Assembly

plant in St. Louis, Missouri and sue officials of Local 25, UAW. In their Complaint Plaintiffs challenge the expenditure for political or ideological purposes of dues collected under the union security agreement between the Company and the Union. The case is pending before the District Court. In *Gabauer v. Woodcock, et al.*, E.D. Mo. CA No. 72C164(2) and *Huskey v. Woodcock, et al.*, E.D. Mo. CA No. 72C165(4), both filed in March 1972, two of the Plaintiffs in CA No. 72C180(A) *supra* seek damages for their removal from union office, disqualification from further office and for defamation arising from the Union's charge that they misappropriated funds.

(4) *Seay, et al., v. McDonnell Douglas Corporation, et al.*, C.D. Cal., CA No. 67-1394-HP, filed September 1967. Plaintiffs are employed at McDonnell Douglas Corporation in Santa Monica and other cities in California and sue the company and the International Association of Machinists (IAM), District Lodge 1578. In their Complaint Plaintiffs challenge the legality of the dues-support obligations under the union security agreement between the Company and the Union, particularly because of political expenditures by the Union. The case is pending before the District Court.

(5) *Marker, et al. v. Connally, et al.*, D.C.C., CA No. 2486-71, filed December 1971. Plaintiffs are employed at McDonnell Douglas Corporation and North American Rockwell Corporation in plants located in Santa Monica, Downey and Long Beach, California, and sue the Secretary of the Treasury and the Commissioner of Internal Revenue. In their Complaint Plaintiffs challenge the tax exempt status of the UAW and the IAM to the extent that the Unions collect and expend dues for political purposes. This case is pending before the

United States Court of Appeals for the District of Columbia Circuit following dismissal of the Complaint by the District Court.

(6) *Walsh, et al. v. Connally, et al.*, C.D. Cal., CA No. 71-3062-III, filed December 1971, transferred to D.D.C. CA No. 748-72. Plaintiffs are employed at the General Motors assembly plant in South Gate, California and the McDonnell Douglas Corporation in Santa Monica, California, and sue the Secretary of the Treasury and the Commissioner of Internal Revenue. In their Complaint Plaintiffs challenge the tax exempt status of the UAW and IAM to the extent that the Unions collect and expend dues for political purposes. This case was transferred to the United States District Court for the District of Columbia and remains dormant pending the decision of the United States Court of Appeals in *Marker, et al. v. Connally, et al.* (see ¶ (5) above).

(7) *Buckley, et al. v. American Federation of Television and Radio Artists*, S.D.N.Y., 71 Civ. 146, filed June 1971. Plaintiff Buckley, a radio and television commentator, sues the American Federation of Television and Radio Artists (AFTRA). In this Complaint Plaintiff Buckley challenges the union security agreement between AFTRA and broadcasting companies and the legality of the dues-support obligations thereunder. A summary judgment for Plaintiffs has been stayed pending appeal to the United States Court of Appeals for the Second Circuit.

(8) *Evans v. American Federation of Television and Radio Artists*, S.D.N.Y., 71 Civ. 3920, filed September 1971. Plaintiff, a radio commentator for the Columbia Broadcasting System, sues AFTRA. In his Complaint Plaintiff challenges the union security agreement be-

tween AFTRA and CBS and any other broadcasters and the legality of the dues-support obligations thereunder. Summary judgment for Plaintiff has been stayed pending appeal to the Second Circuit.

(9) *Lewis v. American Federation of Television and Radio Artists, et al.*, N.Y. Sup. Ct., N.Y. Co., filed November 1971. Plaintiff, a radio and television commentator, sues AFTRA. In his Complaint Plaintiff challenges the union security agreement between AFTRA and broadcasting companies and the legality of the dues-support obligations thereunder. After dismissal of the Complaint by the trial court, the New York Appellate Division reinstated the Complaint and ruled for the Union on the merits. Plaintiff has appealed to the New York Court of Appeals.

(10) *Mendoza, et al. v. United Farm Workers Organizing Committee, et al.*, E.D. Cal., CA No. F-449 Civil, filed September 1970. Plaintiffs are employed by growers of agricultural products and sue the United Farm Workers Organizing Committee (UFWOC) and the growers. In their Complaint Plaintiffs challenge the union security agreement between UFWOC and the farm growers and the legality of the dues-support obligations thereunder. The Unions' motion to dismiss was granted by the trial court and an appeal is pending in the Ninth Circuit.

(11) *Gabaldon, et al. v. United Farm Workers Organizing Committee*, Cal. Sup. Ct., Tulare Co., No. 70106, filed August 1970. Plaintiffs are employed by growers of agricultural products and sue UFWOC and the growers. In their Complaint Plaintiffs challenge the union security agreement between UFWOC and the growers and the legality of the dues-support obligations thereunder. The Union was awarded judgment on the

pleadings in the trial court and an appeal is pending in the District Court of Appeals.

(12) *Ponciano, et al. v. United Farm Workers Organizing Committee, et al.*, Cal. Sup. Ct., Kern Co., No. 111447, filed October 1970. Plaintiffs are employed by growers of agricultural products and sue UFWOC and the growers. In their Complaint Plaintiffs challenge the union security agreement between UFWOC and the growers and the legality of the dues-support obligations thereunder. This case is a companion of *Gabaldon, supra*, and is pending in the trial court.

(13) *Branden v. Herman, et al.*, W.D. Mo., CA No. 2784, filed September 1971. Plaintiff, a former employee of the Paul Mueller Co. in Springfield, Missouri, sued officials of the National Labor Relations Board. Prior to filing his judicial Complaint, Plaintiff had been terminated from employment for union dues arrearages and had filed charges before the National Labor Relations Board alleging National Labor Relations Act violations by Local 146, Sheet Metal Workers' International Union, AFL-CIO, and the Company for their actions under the union security agreement. Plaintiff's judicial Complaint seeking to compel issuance of a Labor Board complaint against the Union and the Company was dismissed by the District Court. The Court of Appeals for the Eighth Circuit affirmed and Plaintiff's petition for certiorari was denied by the Supreme Court.

(14) *Lay, et al. v. Construction, Production and Maintenance Laborers' Union, Local No. 383 et al.*, Ariz. Sup. Ct., Maricopa Co., No. 31374, filed May 1972. Plaintiff Lay was employed by Wells Masonry, Inc. in Arizona after referral to the Company by Local

383, Construction, Production and Maintenance Laborers' Union, an affiliate of the Laborers' International Union of North America. In his Complaint against the Company and the Union, Plaintiff claims that he was terminated from employment because he was not a member in good standing of the Union and challenges the legality of an alleged union security agreement between Wells and the Union. The case is pending before the State trial court.

(15) *Richardson v. Communications Workers of America, AFL-CIO, et al.*, D. Neb. CA No. 02673, filed December 1966. Plaintiff, a former employee of the Western Electric Company of Omaha, Nebraska, sues Local 7495 of the Communications Workers of America and the Company. Although the Company discharged him from employment nine months after his withdrawal from the Union, Plaintiffs' Complaint alleges that his non-membership in the Union caused the discharge and seeks damages arising from his separation. A jury verdict for Defendants was set aside as excessive and a new trial has been ordered. Plaintiff has appealed unsuccessfully to the Tenth Circuit and the order for new trial has been stayed while Plaintiff petitions the Supreme Court for certiorari.

(16) *Ferro, et al. v. Hercules, Inc., et al.*, Pulaski Co., Va. Cir. Ct. in Chancery, filed November 1968. Plaintiffs, employees of Hercules, Inc. in Radford, Virginia, sued Local 3-495, Oil, Chemical and Atomic Workers International Union, AFL-CIO, and the Company. In their Complaint Plaintiffs sought to restrain the check off of their union dues. The State trial court ordered restitution of dues collected after the employees had resigned from the Union.

(17) *Adams, et al. v. City of Detroit, et al.*, Wayne Co., Mich., Cir. Ct. Case No. 159940, filed June 1970. Plaintiffs, employees in the classified service of the City of Detroit, sue the City and District Council 77 of the American Federation of State, County and Municipal Employees. In their Complaint Plaintiffs challenge the validity of the agency shop clause in the contract between the Union and the City and the legality of the dues-support obligations thereunder. The trial court granted Plaintiffs' prayer for injunctive relief in accordance with *Smigel v. Southgate Community School District*, Mich. Sup. Ct. (1972).

(18) *Havas, et al. v. Communications Workers of America, et al.*, N.D.N.Y., CA No. 75-CV-268, filed May 1975. Plaintiffs are employed by the New York Telephone Company and sue the CWA and the AFL-CIO and various of the subsidiary organizations, and their employer. In their Complaint, Plaintiffs challenge the alleged use by the AFL-CIO and the CWA of a portion of union fees for purposes not directly related to collective bargaining. The case is pending in the District Court.

(19) *Lohr, et al. v. Association of Catholic Teachers, et al.*, E.D. Pa., CA No. 75-1910, filed July 2, 1975. Plaintiffs are teachers in three high schools within the secondary school system of the Archdiocese of Philadelphia. In addition to the Association of Catholic Teachers and one of its employees, they sue the American Federation of Teachers, the AFL-CIO, various of their subsidiary organizations, and the Archdiocese's School System and one of its employees. In their Complaint, Plaintiffs challenge the alleged use by the AFL-CIO and the ACT of a portion of union fees for purposes not directly related to collective bargaining. The case is pending in the District Court.

(20) *Ellis, et al. v. Brotherhood of Railway, Airline and Steamship Clerks, et al.*, S.C. Cal., Civil No. 73-113-N, filed March 1973 and subsequently consolidated with *Fails, et al. v. Same*, S.C. Cal., Civil No. 73-118-S, also filed March 1973. Plaintiffs are employed by Western Air Lines and sue BRAC and various of its subsidiary organizations. In their Complaints, Plaintiffs challenge Defendants' alleged use of a portion of union dues and fees for purposes not directly related to collective bargaining. The case is pending in the District Court after denial of Defendants' Motion for Summary Judgment and pending determination of Plaintiffs' Motion for Summary Judgment.

(21) *Dean v. Local 164 IBEW, et al.*, S.D.N.Y., CA No. 74, Civ. 1944, filed May 1974. Plaintiff is a pensioned member of Local 3, IBEW, who worked as a traveling wireman. He sues the IBEW, its Local 164, and the National Electrical Contractors Association, complaining that Local 164's hiring hall is operated more beneficially for regular union members than for members in the traveler classification, and challenging the legality of the contractual provision for such referral procedure. The case is pending before the District Court. In *Turpin, et al. v. NLRB*, Case No. 22-CB-2455, filed July 1973, the charging parties were members of various other IBEW locals, complaining of the same alleged actions by Local 164 and charging that such acts constituted unlawful discrimination within the meaning of Section 7 of the National Labor Relations Act. The NLRB dismissed the charges against Defendants and an appeal to the General Counsel was denied.

The Answer of the Original Defendants:

9. Deny each and every allegation contained in Paragraph 10 except admit that the Foundation has supported the various actions listed therein with the exceptions of *Gabauer v. Woodcock*, C.A. No. 72C164(2) and *Huskey v. Woodcock*, C.A. No. 72C154(4). Defendants further aver to the Court that none of the cases supported by the Foundation as listed in the aforesaid Paragraph 10 involve in any way the protection or vindication of rights of members of labor organizations within the meaning of §101(a)(4) of the Act.

The Answer of the Intervenors:

9. DENY

(i) That this Court has jurisdiction or power to review or rule upon the actual or potential issues in any of the seventeen cases named and tendentiously described in paragraphs numbered "10(1)" through "10(21)" of the Amended Complaint; since all of these cases have been filed in or are now pending in Courts other than this Court; and

(ii) That any defense by a union on the basis of the second proviso of §101(a)(4) LMRDA is available in any Court except the Court where the suit by the union member is pending.

The Second Amended Complaint:

11. The Foundation has on numerous occasions publicly proclaimed its financial and legal assistance for

the above suits. See Attachments F, G, H, J, K, L, M and N.

The Answer of the Original Defendants:

10. Deny each and every allegation contained in Paragraph 11 except admit that the Foundation has publicly proclaimed its financial and legal assistance to all actions listed in Paragraph 10 of the Second Amended Complaint with the exceptions of *Gabauer v. Woodcock*, C.A. No. 72C164(2) and *Huskey v. Woodcock*, C.A. No. 72C165(4).

The Answer of the Intervenors:

10. DENY KNOWLEDGE OR INFORMATION sufficient to form a belief as to the allegations contained in paragraph number "11" of the said Amended Complaint; but

DENY the portions of said paragraph which imply, allege, tend to allege or to intimate: that the "financial and legal assistance" there alleged is beyond the protection of the First, Fifth, Ninth, Tenth, Thirteenth and Fourteenth Amendments of the United States Constitution and of §103 LMRDA.

The Second Amended Complaint:

12. By the activities above set forth, the Foundation (aided by the Committee) has financed, encouraged, managed and participated (other than as a party) in

suits instituted by employees and members of labor organizations, which challenge their financial obligations to the union which is their collective bargaining representative. In those activities the Foundation has been acting as an agent and conduit for employers interested in promoting such suits in order to (1) promote their self-interest in restricting the permissible scope of legality of union security provisions to which they have agreed, been asked to agree, or expect to be required to agree; (2) weaken the dues resources of labor organizations with which they have or anticipate having collective bargaining or other relationships; and (3) generally establish legal limitations on union security and union political activities which enhance union strength vis-a-vis such employers.

The Answer of the Original Defendants:

11. Deny each and every allegation contained in Paragraphs 12, 13, 14 and 15.

The Answer of the Intervenors:

11. DENY KNOWLEDGE OR INFORMATION sufficient to form a belief as to the allegations contained in paragraph numbered "12" of the Amended Complaint; but

DENY the portions of said paragraph which imply, allege, tend to allege or to intimate:

(i) That Defendants have no Constitutional and statutory right to finance, encourage, manage and participate in suits instituted by employees and members of labor organizations to challenge the alleged

"financial obligations" of employees and union members to their collective bargaining representatives;

(ii) That, in all the cases in which Defendants aided employees or union members, either Defendant ever acted as agent or conduit for employers (whether "interested" or not);

(iii) That there is any violation of any statute or law in Defendants' promotion of "such suits in order to (1) promote their [employers'] self-interest in restricting the permissible scope of legality of union security provisions to which they have agreed, been asked to agree, or expect to be required to agree; (2) weaken the dues resources of labor organizations with which they [employers] have or anticipate having collective bargaining and other relationships; and (3) generally establish legal limitations on union security and union political activities which enhance union strength vis-a-vis such employers" (all as stated in paragraph number "12" of the said Amended Complaint);

(iv) That promotion of "such suits" is unprotected by the First, Fifth, Ninth, Tenth, or Thirteenth Amendments to the United States Constitution;

(v) That any actual or potential issues, raised by any such suits, are within the jurisdiction of this Court (as distinguished from the Courts in which those suits were filed or are pending); and

(vi) That this Court has power or jurisdiction to review or rule upon aspects of such suits in any respect.

The Second Amended Complaint:

13. The actions of the Defendant Foundation as set forth in paragraphs 9 through 12 are in violation of Section 101(a)(4) of the Act.

14. The aforesaid activities of the Foundation, the Committee, and employers giving financial support to the Foundation, implement a conspiracy between those parties to violate Section 101(a)(4) of the Act.

15. By virtue of Defendants' aforesaid activities Plaintiffs have suffered tangible injury from the costs and burdens of litigation wrongfully and unlawfully financed, aided, encouraged, managed, and maintained by the Defendants in violation of Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959. They will suffer further and irreparable injury unless equitable relief is granted restraining and enjoining further such violations for which Plaintiffs have no adequate remedy at law.

The Answer of the Original Defendants:

11. Deny each and every allegation contained in Paragraphs 12, 13, 14 and 15.

The Answer of the Intervenors:

12. DENY the allegations contained in the paragraphs of said Amended Complaint numbered "13", "14", "15", "16", "17".

The Second Amended Complaint:

SECOND CAUSE OF ACTION—SECTION 203(b)(1)

16. For their second cause of action, Plaintiffs incorporate and reallege the facts set forth in paragraphs 1-15 above. In addition to the unions named in

paragraph 10 above, the Detroit Federation of Teachers, an affiliate of the American Federation of Teachers, has also been sued with Foundation support in cases challenging the validity of the agency shop clause. *Warczak, et al. v. Detroit Board of Education, et al.*, Mich. Cir. Ct., Wayne Co., Case No. 145080, filed April 1970 and *Abood et al. v. Detroit Board of Education et al.*, Case No. 155255 in the same court. The Detroit Federation of Teachers and the American Federation of Teachers are additional Plaintiffs in this case of action.

The Answer of the Original Defendants:

12. As to Paragraph 16, Defendants repeat and reallege each and every admission and denial set forth in Paragraphs 1 through 11 of this Answer to Second Amended Complaint and Counterclaims with the same force and effect as is set forth at length herein. Defendants further deny each and every allegation contained in Paragraph 16 except admit that the Foundation has provided support to Plaintiffs in the actions listed therein.

The Answer of the Intervenors:

12. DENY the allegations contained in the paragraphs of said Amended Complaint numbered "13", "14", "15", "16", "17".

The Second Amended Complaint:

17. Section 203(b)(1) of the Act (29 U.S.C. 433(b)(1)) provides that every person "who pursuant to

any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly . . . to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing" shall file annual reports with the Secretary of Labor including a "detailed statement of the terms and conditions of such agreement or arrangement" and a statement of all "receipts" and "disbursements." As described in paragraphs 7 through 10, the Foundation, assisted by the Committee, has been principally engaged in the fomenting, sponsoring, financing and managing of law suits by employees against labor organizations and others challenging union security agreements, dues payments, and other basic components of the employees' rights to organize and bargain. The litigation, as well as the anticipated prospects of success in the litigation, are means by which the Foundation and the Committee are seeking directly or indirectly to persuade employees to exercise or not to exercise, or to persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing. In addition to the litigation, the Foundation and the Committee engage in a wide range of activities, including the dissemination of employee-directed propaganda and the financing of employee groups, attempting directly or indirectly to persuade employees to exercise or not exercise, or to persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing.

The Answer of the Original Defendants:

13. Deny each and every allegation contained in Paragraph 17 except admit the existence of §203(b)(1) of the Act but respectfully refer the Court to said statute for the terms thereof.

The Answer of the Intervenor:

12. DENY the allegations contained in the paragraphs of said Amended Complaint numbered "13", "14", "15", "16", "17".

The Second Amended Complaint:

18. In recent years, the Foundation and/or Committee have entered and continue to enter into agreements or arrangements with employers where an object thereof is directly or indirectly, to persuade employees subject to, or who may become subject to, union security contracts not to exercise their rights to organize and bargain collectively through representatives of their own choosing, or to persuade employees as to the manner of exercising their aforesaid rights to organize and bargain.

The Answer of the Original Defendants:

14. Deny each and every allegation contained in Paragraphs 18, 19, 20 and 22.

The Answer of the Intervenor:

13. DENY KNOWLEDGE OR INFORMATION sufficient to form a belief as to the factual allegations of the paragraph of said Amended Complaint numbered "18"; but

DENY those portions of said paragraph which imply, allege, tend to allege or to intimate: that the alleged "agreements or arrangements with employers" having the object stated in paragraph "18" violate any statute or rule of law or are unprotected by the United States Constitution, Article I, Section X, Clause [1] and the First, Fifth, Ninth and Tenth Amendments of said Constitution.

The Second Amended Complaint:

19. In recent years the Foundation and Committee have had available steadily rising contributions which they have used for litigation or other activities intended to persuade employees as to the manner of exercising their aforesaid rights to organize and bargain.

The Answer of the Original Defendants:

14. Deny each and every allegation contained in Paragraphs 18, 19, 20 and 22.

The Answer of the Intervenor:

14. DENY KNOWLEDGE OR INFORMATION sufficient to form a belief as to the factual allegations

contained in the paragraph of said Amended Complaint numbered "19"; but,

DENY those portions of said paragraph which imply, allege or tend to allege or to intimate:

(i) That the alleged "litigation and other activities intended to persuade employees as to the manner of exercising their * * * rights to organize and bargain" are unprotected by the First Amendment to the United States Constitution; and

(ii) That this Court has power, authority or jurisdiction to review or rule upon any aspect of such "litigation and other activity", whether past, present or future (since such "litigation and other activity" are not matters pending in this Court).

The Second Amended Complaint:

20. Nevertheless, in violation of Section 203(b)(1) each year since 1969 both the Foundation and the Committee have failed to file with the Secretary of Labor reports setting forth detailed statements of the terms and conditions of the agreements or arrangements described in paragraph 18 above between the contributing employers and the Foundation and/or the Committee. Nor has the Foundation or the Committee since 1969 ever reported to the Secretary a statement of receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and the disbursements of any kind, in connection with such services and the purposes thereof, all as required by §203(b)(1).

The Answer of the Original Defendants:

14. Deny each and every allegation contained in Paragraphs 18, 19, 20 and 22.

The Answer of the Intervenor:

15. DENY KNOWLEDGE OR INFORMATION sufficient to form a belief as to the allegations set forth in paragraph number "20" of the Amended Complaint, but DENY failure by the Defendants to file such statements was a violation of Section 203(b)(1).

The Second Amended Complaint:

21. Plaintiffs have exhausted their administrative remedies before the Secretary of Labor, the Secretary having indicated in a letter dated November 13, 1972 to the General Counsel for the Plaintiff United Automobile Workers that the Secretary will not enforce §203(b)(1) against the Foundation or the Committee.

The Answer of the Original Defendants:

15. Deny each and every allegation contained in Paragraph 21 except admit that the Secretary of Labor found no basis for enforcing §203(b)(1) of the Act against the Foundation or the Committee.

The Answer of the Intervenor:

16. DENY KNOWLEDGE OR INFORMATION sufficient to form a belief as to the allegations contained in paragraph numbered "21" of the Amended Complaint.

The Second Amended Complaint:

22. Plaintiffs have no adequate remedy at law with respect to Defendants' continuing violations of §203(b)(1). Unless equitable relief is granted restraining and enjoining such violations, Plaintiffs will continue to suffer irreparable injury.

The Answer of the Original Defendants:

14. Deny each and every allegation contained in Paragraphs 18, 19, 20 and 22.

The Answer of the Intervenor:

17. DENY each and every allegation contained in the paragraph of said Amended Complaint numbered "22".

Demurrer of the Original Defendants:

16. The Second Amended Complaint fails to state a claim upon which relief can be granted against the Foundation or the Committee.

Demurrer of the Intervenor:

18. The Amended Complaint fails to state a claim upon which relief can lawfully be granted.

Defenses of the Original Defendants:²*AS AND FOR A SECOND DEFENSE*

17. This Court has no jurisdiction of the subject matter because in no case listed in the complaint as having received support from the Foundation is there any claim relating to rights protected by Title I of the Act, 29 USC §411-415.

AS AND FOR A THIRD DEFENSE

18. This Court has no jurisdiction of the subject matter of this action because the Act, 29 USC §411(a)(4) et seq. does not give rise to an affirmative cause of action but must be interposed as a defense in the respective litigations.

²The defenses set forth by the original Defendants which are identified as the Second Defense, the Fourth Defense, the Fifth Defense, the Seventh Defense and Eighth Defense are unique to the original Defendants. The defenses identified by the original Defendants as the Third Defense, and the Sixth Defense are also similarly pleaded by the Intervenor; see Intervenor's Defenses identified as the Seventh Defense and Eighteenth Defense, respectively. The remaining twenty-two defenses of the Intervenor are unique to them.

AS AND FOR A FOURTH DEFENSE

19. As to the Second Cause of Action, this Court has no jurisdiction to enforce the reporting requirements of §203(b)(1) of the Act because the right to bring action for such enforcement lies solely within the discretion of the Secretary of Labor.

AS AND FOR A FIFTH DEFENSE

20. The Second Cause of Action cannot be maintained because of Plaintiffs' failure to join the Secretary of Labor as a necessary and indispensable party.

AS AND FOR A SIXTH DEFENSE

21. The claims alleged in the Second Amended Complaint against the Foundation and the Committee are barred by waiver, estoppel and laches.

AS AND FOR A SEVENTH DEFENSE

22. The claims alleged in the Second Amended Complaint against the Foundation and the Committee are barred by the statute of limitations.

AS AND FOR AN EIGHTH DEFENSE

23. Plaintiffs are not entitled to any equitable relief because they have unclean hands.

Defenses of the Intervenor:

FOR A SECOND AFFIRMATIVE DEFENSE

19. Section 101(a)(4) LMRDA, 29 U.S.C. §411(a)(4), 1970, provides in pertinent part that "[n]o labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency * * * ." (Emphasis supplied.)

20. Section 3(o) LMRDA, 29 U.S.C. §402(o) (1970), defines "member" when used in reference to a labor organization as:

Any person who has fulfilled the requirements for membership in such organization, and who has neither voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and by-laws of such organization. (Emphasis supplied.)

21. Intervenor-Defendants Orland O. Bergstrom, Gerald M. Marker, Bob Elaydo, Benjamin L. Righter, Marguerite M. Sanders, Dale Richardson, Phyllis A. Browne, and Dr. Anne Parks are, like Defendants, not members of any unions as that term is defined in §402(o) (1970).

22. Therefore, Plaintiffs have not limited, and can assert no claim to "limit", the right of said Intervenor-Defendant non-members to institute actions or proceedings in any court or administrative agency with financial and other assistance from the Defendant Foundation, whatever the "interest" of its employer-contributors in such actions or proceedings.

23. Plaintiffs, as their Amended Complaint shows, do not seem aware that institution of a suit *by a union member* is a statutory prerequisite to invocation, by a union, of the defense that the provisos of §101(a)(4) LMRDA have been violated; and that said Section is limited to institution of suits *by members of the very union which invokes said provisos* or either of them (as shown by the words "any members thereof" in the Statute).

24. The Complaint is therefore, on its face, insufficient and should be dismissed.

FOR A THIRD AFFIRMATIVE DEFENSE

25. The second proviso of Section 101(a)(4) LMRDA is unconstitutional and void because of vagueness; it violates substantive and procedural due process under the Fifth Amendment to the United States Constitution unless it is applied only to purely intra-union disputes which are not in the public domain.

FOR A FOURTH AFFIRMATIVE DEFENSE

26. The "right of any [union] member * * * to institute an action in any court, or in a proceeding before any administrative agency" [Section 101(a)(4) LMRDA] is a *Constitutional* right granted by the United States Constitution, Article III, and the First, Fifth, Ninth, Tenth, and Thirteenth Amendments of that Constitution.

27. The "right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding" [Section 101(a)(4) LMRDA] is a right protected by the First, Fifth, Ninth, Tenth and Thirteenth Amendments to the United States Constitution as well as by Article III of that Constitution.

28. The "right of any member of a labor organization * * * to petition any legislature or to communicate with any legislator" [Section 101(s)(4) LMRDA] is a right protected by the First, Fifth, Ninth, Tenth, and Thirteenth Amendments to the United States Constitution, and by Article III thereof.

29. The First and Second provisos appended to Section 101(a)(4) LMRDA constitute purported exceptions or limitations upon all three constitutional rights described above in paragraphs 25, 26, and 27 of this Answer.

30. Therefore, said provisos, as legislative attempts to limit rights protected by the United States Constitution, are unconstitutional and void.

FOR A FIFTH AFFIRMATIVE DEFENSE

31. Defendant-Intervenors repeat and reallege each and every allegation contained in the paragraphs of this Answer numbered 1 through 31.

32. By use of the phrase, "no labor organization shall limit any right" [of any union member], Section 101(a)(4) LMRDA inferentially states and necessarily implies that the union member's claim and right must arise out of an intra-union dispute or controversy, i.e., a dispute or controversy for which intra-union remedies

can properly be exhausted within four months. The Amended Complaint makes no such allegation, either expressly or by implication.

33. But there are two different kinds of intra-union disputes between a union and its members:

Category I: Those disputes for which no union can provide a proper remedy, such as disputes which involve a member's rights under the United States Constitution or statutory rights superseding union bylaws; and

Category II: Those disputes which involve purely intra-union rights or claims for which unions can lawfully provide competent remedy.

34. All employee rights in Category I, including the three rights set forth in Section 101(a)(4) LMRDA, are matters lying within the "public domain" and not matters involving only intra-union rights or procedures.

35. No intra-union procedures are adequate to resolve, at any time, any alleged intra-union dispute or controversy based on the arguable violation by a union of any of the Category I rights described in the paragraphs of this Answer numbered 19, 20 and 21. Therefore, no question of union right to "limit" such constitutional rights can validly and constitutionally arise under either of the provisos appended to Section 101(a)(4) LMRDA; nor may such union limitation of any employee's constitutional rights be condoned or immunized from union liability because of aid furnished to the aggrieved employee by an employer, whether "interested" or not.

36. The "interested"-employer issue is, therefore, irrelevant and cannot validly arise under the first cause of action set forth in the Amended Complaint; especially since that Complaint (and Plaintiffs' briefs to date) emphasizes that the first cause of action is

intended to vindicate the total immunity of purely intra-union (or Category II rights) from any employer interference; and since Plaintiffs, losing sight of the constitutional status or quality of the three involved rights mentioned in Section 101(a)(4) LMRDA, attempt to confine their constitutional disputes with their members to intra-union procedural remedies.

37. The Amended Complaint treats all employee rights as if the distinction made *supra* in paragraph 32 of this Answer were nonexistent or unimportant, and as if all employee rights were subject to intra-union regulation and judgment; and as if both provisos in Section 101(a)(4) LMRDA applied to paramount Constitutional and statutory rights of employees, employers and others (such as legal-aid organizations like Defendant Foundation).

38. Therefore, the first cause of action is, on its face, legally insufficient to state a valid claim against Defendants or to serve as the basis for the expansive relief asked for by Plaintiffs.

FOR A SIXTH AFFIRMATIVE DEFENSE

39. Section 101(a)(4) LMRDA, 29 U.S.C. §411(a)(4), (1970), provides in pertinent part that

[n]o labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency * * *: and provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action [or] proceeding * * * (Emphasis supplied.)

40. The "interested-employer" proviso carves out a privilege under or an exemption from this statutory duty [of a labor organization not to "limit the right of any member thereof to institute an action in any court or in a proceeding before any administrative agency"] only as to those cases or controversies in which the labor organization in question has limited, or has a statutory claim to "limit", its member's right to sue.

41. Such limitation and such a statutory claim to "limit" can, as a matter of law, arise validly only in connection with a purely intra-union case or controversy,

(a) which is predicated upon the constitution and bylaws of the labor organization (as opposed to a matter that is in the public domain and beyond the purely internal affairs of the union); and

(b) which can properly and adequately be prosecuted *in the first instance* within the preliminarily exclusive intra-organizational procedures of the union, based on the arguable fact that the union has an applicable, reasonable, and otherwise lawful internal hearing procedure and remedy to which a court or administrative tribunal may lawfully defer under the first proviso in Sec. 101(a)(4) LMRDA or under judicial exhaustion-of-remedies doctrines.

42. Intervenor-Defendants have instituted or will soon institute actions or proceedings based upon claims for relief *within the public domain* and beyond the purely internal affairs of any of the Plaintiff Unions.

43. Therefore, Plaintiffs cannot limit, or assert a claim to "limit", the right of Intervenor-Defendants to litigate in a public forum matters outside of Plaintiffs' exclusive organizational procedures with or without

financial and other assistance from Defendant Foundation, and regardless of the "interest" of Defendants' employer-contributors.

44. The Amended Complaint on its face and as explicated by Plaintiffs since that Complaint was filed is based on the unconstitutional and unstatutory assumption that no controversy between a union member and his union can be in the public domain or beyond the reach of either proviso in Section 104(a)(4) LMRDA.

45. The first cause of action in the Amended Complaint therefore states no claim upon which relief may lawfully be granted.

FOR A SEVENTH AFFIRMATIVE DEFENSE

46. The second proviso of Section 101(a)(4), LMRDA by its terms and its syntactical status as a proviso, authorizes only an affirmative defense by a labor organization seeking to sue on the basis of that proviso and only in the particular "action or proceeding" instituted against it by that union's *member*.

47. Section 101(a)(4) LMRDA nowhere authorizes or allows a cause of action instituted by a labor organization prior to or independently of a prior "action or proceeding" by that union's member. Such prior action is a condition precedent to the applicability of *both provisos* of Section 101(a)(4), as the text, syntax and language of that Section demonstrate.

48. Thus, this Court does not have jurisdiction, in law or in equity, over the first cause of action set forth in the Complaint; since it has no jurisdiction over any "action or proceeding" instituted by any member of a labor organization named in the Amended Complaint.

49. Therefore, the first cause of action is on its face insufficient to state or support a valid claim.

FOR AN EIGHTH AFFIRMATIVE DEFENSE

50. Defendant-Intervenors repeat and reallege each and every allegation and quotation contained in the paragraph of this Answer numbered 38.

51. The "interested-employer" proviso carves out a privilege or exemption from this duty [of a labor organization not to "limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency"] only in those cases or controversies in which the labor organization in question has limited, or has asserted a legitimate claim to "limit", its member's right to sue independent of §101(a)(4).

52. Such a limitation and such an assertion of a legitimate claim to "limit", as a matter of law, must first be raised in the public forum in which the member of the labor organization has sought to institute an action or proceeding, before that claim can even arguably be asserted elsewhere to "limit" said member's right to sue.

53. As identified, certain Intervenor-Defendants have instituted actions or proceedings in which none of the Plaintiff Unions, by way of a motion to dismiss, affirmative defense, counterclaim, or otherwise, has raised any timely or even arguable claim to "limit" any of said Intervenor-Defendants' actions or proceedings in the public forum in which said actions or proceedings were instituted.

54. Therefore, Plaintiffs have no standing to assert in this Court a claim to "limit" the right of said

Intervenor-Defendants to litigate said actions or proceedings in any other public forum with financial or other assistance from the Defendant Foundation, whatever the "interest" of its employer-contributors in such litigation.

55. Therefore, the Amended Complaint states no claim upon which relief which Plaintiffs seek may validly be granted.

FOR A NINTH AFFIRMATIVE DEFENSE

56. Section 101(a)(4) LMRDA was, by its express language, intended to protect only *union members* (as distinguished from all members of an *appropriate bargaining unit* in which the union members work) in the exercise of their Constitutional rights described in said statute and in paragraphs 25, 26 and 27 of this Answer.

57. But unions (including Plaintiffs) can and do, by arbitrary and unlawful conduct, limit the constitutional and other rights of members of bargaining units who are *not* union members; despite the congressional solicitude expressed in Section 101(a)(4) LMRDA for union members only.

58. Thus, Section 101(a)(4) LMRDA arbitrarily and unfairly discriminates, in regulating and curbing union power, in favor of union members in bargaining units; and it arbitrarily neglects the plight of non-union members in the very same "appropriate bargaining units" which includes the favored union members.

59. Such arbitrary and unfair discrimination against non-union members and in favor of union members in

bargaining units violates both substantive and procedural due process under the Fifth Amendment to the United States Constitution.

60. Therefore, on its face, Section 101(a)(4) LMRDA is void because it is unconstitutional.

FOR A TENTH AFFIRMATIVE DEFENSE

61. Defendant-Intervenors repeat and reallege each and every allegation and quotation made in the paragraph of this Answer numbered 38.

62. The "interested-employer" proviso carves out a privilege or exemption from this duty [of a labor organization not to "limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency"] only in those cases or controversies in which (a) the labor organization in question has asserted a legitimate, specific claim to "limit" its member's right to sue independent of §101(a)(4) and (b) the court or administrative agency in which said action or proceeding was instituted has denied that claim on the basis of the duty not to "limit" established by §101(a)(4).

63. It is a condition precedent to its exercise of the privilege created by the "interested-employer" proviso that the labor organization in question must first be subject to the statutory duty [not to "limit" its member's right to sue] through application of the principal clause of §101(a)(4).

64. Intervenor-Defendants have instituted actions or proceedings in which no plaintiff Union has been subjected to the duty not to "limit" its members' right

to sue by any decision, decree, order, or other action of those courts or administrative agencies in which said action or proceeding was instituted.

65. Therefore, Plaintiff Unions have no standing to assert in this Court a claim to "limit" the rights of Intervenor-Defendants to litigate said actions or proceedings [located in other courts] with financial or other assistance from the Defendant Foundation, whatever the "interest" of its employer-contributors in such litigation.

FOR AN ELEVENTH AFFIRMATIVE DEFENSE

66. The first cause of action set forth in the Amended Complaint, as well as this Court's decisions herein to date, necessarily imply that this Court must, in order to resolve the issues raised by said cause of action, in some way review and rule upon:

(a) Some *past or decided actions* brought by unnamed union members (as well as non-members) in other courts simply because Defendants (who are not alleged to be "employers" in any relevant sense) have supported such union members (or non-members);

(b) Some *pending actions* instituted by union members (as well as non-members) with Defendants' legal or financial support; and

(c) All future "actions or proceedings" brought by union members (and non-members) against Plaintiff unions (and other unions) on the basis of the Defendants' financial, legal or other support of such union members.

67. This Court has no such supervisory jurisdiction or oversight over actions pending in other courts,

whether those actions be past, present or future, as the Amended Complaint herein in its first cause of action erroneously presupposes.

68. Therefore, the first cause of action set forth in the Complaint presents the claim upon which no valid relief can be granted.

FOR A TWELFTH AFFIRMATIVE DEFENSE

69. The Amended Complaint, on its face, proclaims the existence of a "labor dispute", as defined in the Norris-LaGuardia Act, between Plaintiff Unions and Defendants (who, however, have no employees organized by any of the Plaintiffs, or by any other union).

70. Said Amended Complaint, also on its face, seeks injunctive relief against Defendants in that "labor dispute".

71. This Court has no jurisdiction to grant such injunctive relief because such injunction is forbidden by the Norris-LaGuardia Act.

72. Thus, the first cause of action set forth in the Complaint states no claim upon which valid relief may be granted.

FOR A THIRTEENTH AFFIRMATIVE DEFENSE

73. The principal and main legislative thrust and purpose of Section 101(a)(4) LMRDA was to forbid labor organizations from denying (as many of them did and as Plaintiffs now try to do) their members access to

the Courts. That is the main rule of said Section, for which the second proviso constitutes in the legislative scheme a necessarily very narrow exemption or exception (not applicable to disputes on the public domain, but only to purely intra-union matters).

74. But the Complaint herein in its first cause of action seeks to create a new cause of action, unknown to equity or to law, for the purpose of expanding the second proviso far beyond what Congress intended and what the words of the statute are constitutionally or semantically capable of sustaining.

75. Thus, Plaintiffs, in their first cause of action, attempt to convert a statute designed to make courts accessible to union members into a statute allegedly intended to block members' access to the Courts on a broad, unlimited basis.

76. Plaintiffs themselves have exhibited how broad, beyond all reasonable limit, and opportunistic that claimed basis is in their Memorandum [herein]. Supporting Motion to Compel Answers to Interrogatories. There, at pages 4-5 they fabricate five criteria, unknown to statute, common law, national common law, and equity, for the purpose of implementing their ambition for extensive discovery to implement their fictive construction of the second proviso in question.

77. Those criteria, set forth in Plaintiffs' said Memorandum Supporting Motion to Compel Answers to Interrogatories, are there stated in a *single paragraph*, which is quoted below in relevant part, broken into *five paragraphs*:

First, we will determine whether the employers are in the same "line of business" as the unions against whom they are financing litigation;

Second, we will examine the employers' relationship with unions against whom they are financing litigation through the Foundation; * * *

Third, we will examine whether the same contributing employers have a stake in the legal propositions being advanced in the suits against the unions which they are financing * * *.

Fourth, we will examine whether the same contributing employers are also financing the Defendant Committee's efforts which include direct anti-union lobbying and persuader activities.

Finally, we will examine into other anti-union conduct of the contributing employers, which will bear upon their "interest" in contributing to the litigation against unions financed and managed by the Defendant Foundation.

78. Thus, Plaintiffs construe their own Amended Complaint, in its first cause of action, as if it were directed against unionized "employers" (as defined by Section 3(e) LMRDA) rather than against Defendants whose employees no union has organized and as if there were a constructive legal identity between Defendants and the organized "employers" whose employees are the "union members" referred to by Section 101(a) (4) LMRDA.

79. However, neither the text of the first cause of action alleged in the Amended Complaint nor any statutory language authorizes or ever did authorize such a broad reading of the second proviso of Section 101(a)(4) LMRDA and such interpolation of the aforesaid five criteria into that proviso or into its interpretation.

80. Plaintiffs' first cause of action contradicts the broad legislative purpose to deny unions the right to curtail or confiscate access to court by Union members.

That purpose predominates over the second proviso of Section 101(a)(4) LMRDA by confining it to purely intra-union disputes in Category II (§ 33 supra); and it should be given effect to prevent Plaintiffs from conspiring, as they are now conspiring, to render the rights of members to have practical access to the courts a mere nullity. Said first cause of action should be dismissed.

FOR A FOURTEENTH AFFIRMATIVE DEFENSE

81. The first cause of action set forth in the Amended Complaint circumvents the legislative scheme of Section 101(a)(4) of LMRDA to allow only affirmative defenses upon the basis of the second proviso in individual-member "actions or proceedings" by invention of an equity action unknown to equity, to common law or to statutory law.

82. To accomplish this, the Amended Complaint was framed to express a purpose on the part of Plaintiffs which this Court has very perceptively discerned.

83. That purpose this Court has heretofore stated in this case (366 F. Supp. at 46-47):

This action is brought by the International Union of United Automobile Workers of America and nine other Unions to *correct an imbalance in labor-management relations resulting from the alleged interference by "interested employers" in judicial disputes between unions and their members.* * * * Plaintiffs are ten Unions seeking declaratory and *injunctive relief* and damages against defendant * * * to restrain defendants from financing and supporting legal actions brought by

workers against plaintiff unions as long as defendants receive contributions and support from "interested employers". (Emphasis added.)

84. Neither the National Labor Relations Board nor this Court was granted power by Congress to correct any "imbalance in labor-management relations" or any "interference * * * in judicial disputes"; regardless of whether the "imbalance" was caused by "interested" or uninterested employers.

85. This is clear from the case of *American Shipbuilding Co. v. N.L.R.B.*, 380 U.S. 300, 13 L.Ed.2d 855, 85 S. Ct. 955 (1965), decided by the Supreme Court on March 29, 1965, where the Supreme Court states:

* * * we think that the Board construes its function too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management. [380 U.S. 300, 316]

* * * sections 8(a)(1) and 8(a)(3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power. [380 U.S. 300, 317]

86. A cause of action which this Court has construed as having been designed to "correct an imbalance in labor management relations" does not state a claim upon which relief may be granted in this Court or within its jurisdiction. The first cause of action should therefore be dismissed.

FOR A FIFTEENTH AFFIRMATIVE DEFENSE

87. The first cause of action (as applied and construed by this Court in its decisions to date and by the Plaintiffs in their briefs and papers and in the Amended Complaint, raises many claims and issues which arguably come within the exclusive and preempting jurisdiction of the National Labor Relations Board under Sections 8(a)(1), 8(a)(2) LMRDA.

88. Therefore, this Court has no subject-matter jurisdiction over the first cause of action in the Amended Complaint.

FOR A SIXTEENTH AFFIRMATIVE DEFENSE

89. No part of the labor statutes, laws or policy of the United States Government was designed or intended to regulate the functioning of a legal-aid corporation, society or group, such as the Defendant Foundation.

90. The complaint herein, however, assumes that Section 101(a)(4) LMRDA has become applicable to the functioning of a legal-aid corporation, namely, Defendant Foundation.

91. That assumption finds no warrant whatsoever in LMRDA or any other law.

92. Therefore, the first cause of action set forth in the Amended Complaint does not state a claim upon which relief may be granted.

**FOR A SEVENTEENTH AFFIRMATIVE
DEFENSE**

93. Plaintiffs are not, within the meaning of Section 102, LMRDA, persons *whose rights were secured by the provisions of Title I, LMRDA*, or whose rights have been infringed by violation of that Title.

94. Therefore, Plaintiffs have no standing to sue with respect to the first cause of action set forth in the amended complaint.

**FOR AN EIGHTEENTH AFFIRMATIVE
DEFENSE**

95. Several of the actions or proceedings instituted by certain Intervenor-Defendants have finally adjudicated all justifiable legal issues between said Intervenor-Defendants and the involved unions.

96. Therefore, those unions are absolutely precluded by the doctrine of *res judicata*; and Plaintiffs are precluded by collateral estoppel from litigating in this Court any issues arguably arising in those adjudicated actions or proceedings under §101(a)(4) LMRDA, 29 U.S.C. §411(a)(4), (1970). Such issues were not timely raised in said actions or proceedings. Whether or not said actions or proceedings were "finance[d], encourage[d], or participate[d] in" by "interested employers" through the Defendant Foundation is therefore moot.

97. Therefore, the Amended Complaint sets forth no claim, in its first cause of action, on which relief can lawfully be granted.

**FOR A NINETEENTH AFFIRMATIVE
DEFENSE**

98. No statute, prior to LMRDA, was ever construed by any Court so as to deny to a legal-aid corporation, society or group the right to accept, without limitation, funds or contributions from employer-donors.

99. Plaintiffs, by their first cause of action, seek to construe the LMRDA as if it contained an extensive limitation upon the rights of employer-donors to make contributions to one or both of the Defendants and correlatively to prevent said Defendants from receiving such donations from employers: all for the purpose of depriving dissident employees, for all practical purposes, of access to the courts.

100. However, Section 103 LMRDA, reads:

Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any state or federal law or before any court or other tribunal, or under the constitution or by-laws of any labor organization.

Recourse to a legal-aid corporation or group by union employees (and non-union employees) is one of "the rights and remedies" protected by the quoted statute; and suppression of Defendant Foundation as intended by Plaintiffs is a direct limitation on "the rights and remedies" of members of labor organizations and of other employees under Section 103 LMRDA.

101. Prior to enactment of LMRDA, members of labor organizations (and other employees) had the clear and unlimited right to accept financial and legal help from legal-aid corporations like Defendant Foundation.

102. Section 103 LMRDA (quoted above) preserves that unlimited right, regardless of anything else contained in Title I LMRDA.

103. Section 103 establishes that the LMRDA gives no privilege to any labor organization to "limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency", by destroying legal-aid sources of money needed by the union member to institute actions or proceedings protected by Section 101(a)(4) LMRDA.

104. Therefore, notwithstanding anything stated or intended in the second proviso of Section 101(a)(4) LMRDA, the right of members of labor organizations to accept help from Defendant Foundation, and the correlative right of Defendant Foundation to give such help, is not limited in any way by LMRDA.

105. None of Plaintiff Unions, therefore, has standing to assert any claim to "limit" the right of the Intervenor-Defendants to prosecute their several actions or proceedings by cutting off legal aid on the exclusive basis of the "interested-employer" proviso to §101(a)(4), whether or not those actions or proceedings are finance[d], encourage[d] or participate[d] in" by "interested employers" through Defendant Foundation.

106. For this reason, the complaint herein sets forth no claim upon which relief can be granted.

*FOR A TWENTIETH AFFIRMATIVE
DEFENSE*

107. Section 101(a)(4) LMRDA creates no right of action by a labor organization against a union member against an employee or against an employer, whether "interested" or not.

108. Nor does said Section create a right of action by a labor organization against a non-union employee or against an employer, whether "interested" or not.

109. Therefore, the first claim for relief alleged in the amended complaint should be dismissed as a claim upon which no relief may be granted by this Court.

*FOR A TWENTY-FIRST AFFIRMATIVE
DEFENSE*

110. Defendant-Intervenors repeat and reallege each allegation and quotation set forth in paragraph numbered 38 of this Answer.

111. Section 101(a)(4) LMRDA, 29 U.S.C. §411(a)(4), (1970), does not provide any rights for any labor organization. The principal clause of that section establishes a duty incumbent upon a labor organization [not to "limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency"].

112. The "interested-employer" proviso purports to carve out a privilege or exemption (which defines an absence of the duty not to "limit") when a member's action nor proceeding is "finance[d], or participate[d], in" by an "interested employer".

113. The "interested-employer" proviso does not proscribe "interested-employer" support of union-members' right to sue, in the sense of a creating an actionable violation of the LMRDA; it merely establishes the condition precedent to exemption from the duty (not to "limit") created by the principal clause of §101(a)(4).

114. None of the Plaintiff Unions, therefore, has standing to assert any implied right to "limit" the explicitly reserved right of the Intervenor-Defendants to sue, whether or not the suits are "finance[d], encourage[d], or participate[d] in" by "interested employers" through the Defendant Foundation.

*FOR A TWENTY-SECOND AFFIRMATIVE
DEFENSE*

115. Section 101(a)(4) LMRDA, 29 U.S.C. §411(a)(4) (1970), provides in pertinent part that:

[n]o labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency * * * *provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action [or] proceeding * * *. (Emphasis supplied.)

116. The "interested-employer" proviso purports to carve out a privilege or exemption from this duty [of a labor organization not to "limit" the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency] only in those cases or controversies (a) for which the labor organization in question limits or has an arguable claim to "limit" its member's right to sue independent of §101(a)(4) and (b) to which the court or administrative agency in which the action or proceeding is instituted may temporarily defer under the exhaustion-of-remedies doctrine.

117. The complete and only effect of this exemption or privilege to "limit" is to require the member of the

labor organization to exhaust applicable, reasonable, and otherwise lawful internal union procedures and remedies before litigating his Category II claims in a court or before an administrative agency.

118. To the extent, therefore, that §101(a)(4) may be applicable to "limit" the right of Intervenor-Defendants herein to litigate said actions or proceedings, that "limitation" can require no more than that said Intervenor-Defendants exhaust applicable, reasonable, and otherwise lawful internal union procedures and remedies of the Plaintiff Unions before further litigating their claims in any court or before any administrative agency.

119. Plaintiff Unions have no claim, absent the proven failure of said Intervenor-Defendants to exhaust applicable, reasonable, and otherwise lawful internal procedures and remedies of said Plaintiff Unions, to "limit" the right of said Intervenor-Defendants to litigate said actions or proceedings in any public forum with financial and other assistance from the Defendant Foundation, whatever the "interest" of its employer-contributors in such litigation.

FOR A TWENTY-THIRD AFFIRMATIVE DEFENSE

120. The second proviso of Sec. 101(a)(4) LMRDA is unconstitutional and void as construed by Plaintiffs because it purports to deprive a large number of employers of the constitutional right (a) to aid friends who are union members in litigations whose purpose is to defend the rights of such friends; and (b) the right to support meritorious lawsuits in circumstances where such suits could not be brought except for the aid of

such employers; and (c) the right to associate freely, as the First Amendment guarantees, with employees to support or advance valid legal theses of employees and others and to protect in any lawful way and by any lawful means (including money) the legal, statutory and constitutional rights of others including employees.

FOR A TWENTY-FOURTH AFFIRMATIVE DEFENSE

That the essence and effect of the instant Amended Complaint is to seek, on the basis of the second proviso of §101(a)(4) LMRDA, class action relief in circumstances where such relief is proscribed by Rule 23 F.R.C.P.

Counterclaims of the Original Defendants:

AS AND FOR A FIRST COUNTERCLAIM AGAINST PLAINTIFFS

24. The First Cause of Action alleges, *inter alia*, that the activities of the Foundation and the Committee involving dissemination of information to employees and support of litigation in which labor unions are defendants violate §101(a)(4) of the Act because the Foundation and the Committee solicit and receive money from employers.

25. If and to the extent §101(a)(4) of the Act is construed to apply to the activities of the Foundation or the Committee as prayed for by Plaintiffs, said statute infringes the rights, privileges and immunities of

the Foundation, the Committee and their contributors which are secured by the United States Constitution and the First, Fourth, Fifth, Ninth and Tenth Amendments thereto. The infringement affects but is not limited to the privileges and immunities of United States citizens and the rights to freedom of speech, of the press, of association, of privacy, of the people peaceably to assemble, of equal protection of the laws, of the right to petition the government for a redress against unreasonable searches and seizures, and the right not to be deprived of liberty or property without due process of law and equal protection of the law.

26. If and to the extent §101(a)(4) of the Act is applied as prayed for in the First Cause of Action, said statute is void for vagueness and is repugnant to the Fifth Amendment to the United States Constitution because it fails to give adequate notice of prohibited conduct.

27. Construing §101(a)(4) of the Act as prayed for in the First Cause of Action would cause irreparable harm to the Foundation or the Committee for which there is no adequate remedy at law.

AS AND FOR A SECOND COUNTERCLAIM AGAINST PLAINTIFFS

28. The Second Cause of Action alleges, *inter alia*, that the Foundation and the Committee have entered into agreements or arrangements with employers with the object directly or indirectly to persuade employees not to exercise their rights to organize and bargain collectively or to persuade employees as to the manner of exercising their aforesaid rights without filing with

the Secretary of Labor reports purportedly required by §203(b)(1) of the Act.

29. If and to the extent §203(b)(1) of the Act is construed to apply to the activities of the Foundation of the Foundation or the Committee as prayed for by the Plaintiffs, said statute infringes the rights, privileges and immunities of the Foundation, the Committee and their contributors which are secured by the United States Constitution and the First, Fourth, Fifth, Ninth and Tenth Amendments thereto. The infringement affects but is not limited to the privileges and immunities of United States citizens and the rights to freedom of speech, of the press, of association, of privacy, of the people peaceably to assemble, of the right to equal protection of the laws, of the right to petition the government for a redress of grievances; as well as the rights to be secure against unreasonable searches and seizures, to be free of compulsory self-incrimination and the right not to be deprived of liberty or property without due process of law and equal protection of the law.

30. If and to the extent §203(b)(1) of the Act is applied as prayed for in the Second Cause of Action, said statute is void for vagueness and is repugnant to the Fifth Amendment to the United States Constitution because it fails to give adequate notice of required conduct.

31. Construing §203(b)(1) of the Act as prayed for in the Second Cause of action would cause irreparable harm to the Foundation or the Committee for which there is no adequate remedy at law.

AS AND FOR A THIRD COUNTERCLAIM AGAINST PLAINTIFFS

32. If and to the extent any order is entered requiring the Foundation or the Committee to disclose the names of any of its contributors or the amount any particular person or firm has contributed, such order infringes the rights, privileges and immunities of the Foundation, the Committee and their contributors which are secured by the United States Constitution and the First, Fourth, Fifth, Ninth and Tenth Amendments thereto. The infringement affects but is not limited to the privileges and immunities of United States citizens and rights to freedom of speech, of the press, of association, of privacy, of the people peaceably to assemble, or equal protection of the laws, of the right to petition the government for a redress of grievances; as well as the rights to be secure against unreasonable searches and seizures, to be free of compulsory self-incrimination and the right not to be deprived of liberty or property without due process of law and equal protection of the law.

33. Said order would cause irreparable harm to the Foundation or the Committee for which there is no adequate remedy at law.

Counterclaim of the Intervenors:

COUNTERCLAIM

121. This Court has jurisdiction of this counterclaim under 42 U.S.C. §1985(3) and under the First, Fifth,

Ninth, Tenth and Thirteenth Amendments to the U.S. Constitution.

122. Pursuant to and in furtherance of various agreements and arrangements among them, Plaintiff Unions, by and through their officers and others, have undertaken to act in concert, with knowledge and under color of §101(a)(4) LMRDA, 29 U.S.C. §411(a)(4), (1970), to instigate and prosecute the present action for the purpose of depriving employee-Plaintiffs, such as union members and employees who are not union members and including the Intervenor-Defendants, of freedoms secured by, of the equal protection of, and of equal freedoms under, the Constitution and laws of the United States and of the several states.

123. The aforesaid concerted action was and will be taken with the motivation and animus of inflicting deprivations of freedoms, secured for all citizens by the Constitution and laws of the United States and of the several States, upon the Intervenor-Defendants as a means of denying said employee-Plaintiffs equal access to the judicial process in all those actions or proceedings in which said employee-Plaintiffs seek to litigate statutory or constitutional claims against any of the Plaintiff Unions.

124. The above acts and conduct of the Plaintiff Unions, by and through their officers and others, connected with the instigation and prosecution of the present action under color of §101(a)(4) LMRDA, 29 U.S.C. §411(a)(4), (1970), are denying and threaten to deny to the Intervenor-Defendants the equal enjoyment and exercise of freedoms secured to them as citizens of the United States by the Constitution thereof and by 42 U.S.C. §985(3) (1970), specifically including their

freedom of access to the judicial process guaranteed by the First, Fifth, Ninth, Tenth, and Thirteenth Amendments to the United States Constitution.

125. The Plaintiff Unions have thereby violated and continue to violate 42 U.S.C. §1985(3), (1970).

Prayers for Relief

The Second Amended Complaint:

WHEREFORE, Plaintiffs pray that this Court take jurisdiction of this cause and issue relief upon each Cause of Action in this Complaint as follows:

First Cause of Action

1. A declaratory judgment that Defendant Foundation is violating Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act by financing, encouraging and participating in (other than as a party) suits brought by members of labor organizations and by employees against labor organizations with funds provided by interested employers or employer associations and on their behalf.

2. A permanent injunction prohibiting the Foundation, so long as it receives, directly or indirectly, financial support from interested employers or employer associations, from financing, encouraging, and participating in (other than as a party) any litigation instituted by members of labor organizations or by employees against labor organizations.

3. A permanent injunction prohibiting the Defendant Committee and any interested employers or employers associations acting in concert with said Committee from

aiding or assisting the Defendant Foundation, or any other person, association, organization or party, to finance, encourage or participate in (other than as a party) any litigation instituted by union members or by employees against labor organizations.

4. Compensatory damages to the Plaintiffs for their expenses incurred in litigations unlawfully financed, encouraged and participated in by the Defendant Foundation.

5. Exemplary damages sufficient to deter further and future violations of Section 101(a)(4) of the Act.

6. Such other and further relief as may appear appropriate, including costs and reasonable attorneys' fees in this action.

Second Cause of Action

1. A declaratory judgment that the Defendants Foundation and Committee are violating Section 203(b)(1) of the Labor-Management Reporting and Disclosure Act by failing to file annually with the Secretary of Labor a detailed statement of any agreements or arrangements with contributing employers for the purpose of fomenting or supporting any litigations or other activities intended, directly or indirectly, to persuade employees to exercise or not to exercise, or to persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing—including a statement of all receipts from employers on account of such labor relations services, and disbursements of any kind in connection with such services and the purposes thereof.

2. A permanent injunction requiring the Foundation and Committee to file with the Secretary of Labor at

this time all reports which they should have filed from 1969 to the present pursuant to §203(b)(1) containing detailed statements of any agreements or arrangements with contributing employers for the purpose of fomenting or supporting any litigations or other activities intended, directly or indirectly, to persuade employees to exercise or not to exercise, or to persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing—including a statement of all receipts from employers on account of such labor relations services, and disbursements of any kind in connection with such services and the purposes thereof.

3. A permanent injunction requiring the Foundation and Committee henceforth to file with the Secretary of Labor all reports annually required by §203(b)(1) containing a detailed statement of any agreements or arrangements with contributing employers for the purpose of fomenting or supporting any litigations or other activities intended, directly or indirectly, to persuade employees to exercise or not to exercise, or to persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing—including a statement of all receipts from employers on account of such labor relations services, and disbursements of any kind in connection with such services and the purposes thereof.

4. Exemplary damages sufficient to deter further and future violations of Section 203 of the Act.

5. Such other and further relief as may appear appropriate, including costs and reasonable attorneys' fees in this action.

The Answer of the Original Defendants:

WHEREFORE, the Foundation and the Committee demand judgment as follows:

(a) Dismissing the Second Amended Complaint, together with the costs and disbursements of this action.

(b) On the First Counterclaim, a declaratory judgment that §101(a)(4) of the Act is void under the United States Constitution.

(c) On the Second Counterclaim, a declaratory judgment that §203(b)(1) of the Act is void under the United States Constitution.

(d) On the Third Counterclaim, a further order vacating any prior order requiring disclosure in violation of the United States Constitution.

(e) Any further or alternative relief that this Court may deem proper.

The Answer of the Intervenors:

WHEREFORE, Intervenor-Defendants respectfully pray that this Court:

I. Adjudge and declare that §411(a)(4), (1970), in no way denies, limits, or qualifies the right of said Intervenor-Defendants to receive financial, legal, and other assistance from the Defendant National Right to Work Legal Defense Foundation in the continued prosecution of their several actions or proceedings against any of the Plaintiff Unions, irrespective of the source of the monetary contributions received by said Foundation from the general public, and dismiss the Plaintiff Unions' amended complaint as to its allegations with respect to §101(a)(4) for failure to state a claim upon which relief can be granted; and

II. Adjudge and declare that the Plaintiff Unions are in violation of 42 U.S.C. §1985(3), (1970), and award Intervenor-Defendants compensatory and punitive damages, costs of this action, and reasonable attorneys' fees, jointly and severally, against said Plaintiff Unions on the basis of that violation.

WHEREFORE, the Amended Complaint should be dismissed with costs and disbursements of this litigation.

Statutes and Rules

Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401 *et seq.*)

Relevant Sections

§411(a)(4) *Protection of the Right to Sue.* No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof; *And* provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance or petition.

(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

§412. *Civil action for infringement of rights; jurisdiction*

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of

this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

§413. *Retention of existing rights of members*

Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

§523. *Retention of rights under other Federal and State laws*

(a) Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.

(b) Nothing contained in this chapter and section 186(a-c) of this title shall be construed to supersede or impair or otherwise affect the provisions of the Railway Labor Act, as amended, or any of the obligations, rights, benefits, privileges, or immunities of any carrier, employee, organization, representative, or person subject thereto; nor shall anything contained in this

chapter be construed to confer any rights, privileges, immunities, or defenses upon employers, or to impair or otherwise affect the rights of any person under the National Labor Relations, Act, as amended.

Federal Rules of Civil Procedure

Rule 24

(a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefore and shall be accompanied by a pleading setting forth

the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the Constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. §2403.

As amended Dec. 26, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

APR 18 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1289

GERALD MARKER, ET AL.,
Petitioners (Intervenors),

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AERO-
SPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, ET AL.,
Respondents (Plaintiffs),

and

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND
EDUCATION FOUNDATION, INC., ET AL.,
Respondents (Defendants).

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

**BRIEF IN OPPOSITION FOR PLAINTIFF
UNION RESPONDENTS**

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On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

**BRIEF IN OPPOSITION FOR PLAINTIFF
UNION RESPONDENTS**

**COUNTER-STATEMENT OF ISSUES PRESENTED
FOR REVIEW**

1. Whether intervenors, who are suing plaintiff unions in various federal and state courts with funds and other assistance supplied by defendant Right to Work groups and who are represented in this very case by counsel working with and financed by those defendants, are entitled to intervention of right under

Rule 24(a) two-and-a-half years after suit was commenced.

2. Whether the limited permissive intervention granted intervenors by the District Court under Rule 24(b) was appropriate and, indeed, more than generous to intervenors, and whether the District Court's order granting limited permissive intervention was enforceable by striking intervenors' answer which admittedly went far beyond the limited intervention granted.

COUNTER-STATEMENT OF THE CASE

On May 1, 1973, a number of labor unions and their affiliates filed this suit against the National Right to Work Committee and the National Right to Work Foundation, two employer-financed groups dedicated to attacking union organization and union security. Plaintiff unions' complaint asserted that these two defendants are using employer money to encourage and finance suits by dissident employees and union members against plaintiff unions, in violation of the second proviso to Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(4) (1970). That proviso bars "interested employers" from "directly or indirectly" financing or encouraging suits by union members against their unions. Plaintiffs seek an injunction and other relief against the continued instigation and financing by interested employers, through the defendant Committee and Foundation, of such suits by union members against their unions.

Upon the filing of this suit, defendants immediately moved to dismiss the complaint on a variety of grounds, including objections to the jurisdiction of the Court and a claim that the "interested employer" ban of the law applies only to the immediate employer of the

employee who is suing his union. On October 24, 1973, defendants' motion to dismiss was rejected by the District Court, 366 F. Supp. 46 (D.D.C. 1974), and discovery commenced immediately thereafter. On January 18, 1974, plaintiffs moved in the District Court for an order requiring defendants to reveal, under conditions of litigation confidence, the names of some 190 of the largest contributors among the more than 8000 employer contributors to the Foundation, and on June 5, 1974, the District Court directed defendants to furnish the names sought. Three separate efforts by defendants to obtain a review of that order in this Court were rebuffed.¹ Defendants still refused to comply with the District Court's discovery order and on January 26, 1976, that Court entered a Rule 37 order finding that "interested employers" are contributing to the Foundation's financing of suits by union members against their unions (App. 6a-7a). Having entered its Rule 37 order on the contributions of "interested employers", the District Court, *on its own initiative*, included in this same January 26th order a show cause order why summary judgment should not be entered for plaintiffs on this part of the case (*id.* at 8a). That show cause order is presently pending before the Dis-

¹ On June 27, 1974 defendants filed in the Court of Appeals an appeal and a petition for writ of mandamus to review the District Court's June 5, 1974 discovery order. On June 28, 1974 the Court of Appeals issued an order dismissing the appeal and this Court denied review thereof on January 20, 1975. 419 U.S. 1132. On March 17, 1975 the Court of Appeals issued its opinion dismissing the petition for writ of mandamus, and on April 14, 1975 this Court unanimously (Mr. Justice Douglas not participating) denied petitioners a stay. 421 U.S. 902-03. On June 16, 1975 this Court denied certiorari from the Court of Appeals' dismissal of the petition for writ of mandamus. 422 U.S. 1008. These impositions on the time of this Court were later conceded to be unwarranted by counsel for defendants (D.D.C. Tr. Oct. 9, 1975, at 7-8).

trict Court, along with plaintiff unions' motion for a preliminary injunction requiring the Foundation to place all employer contributions in escrow pending final decision. All briefs and memoranda have been filed below on both the summary judgment and preliminary injunction.

Meanwhile, in January of 1976, *more than two-and-a-half years after this suit was commenced*, Gerald Marker and 15 other persons filed a motion in the District Court to intervene as additional defendants. These intervenors (petitioners here) are the very plaintiffs suing their unions in actions supported by the defendant Committee and Foundation with "interested employer" contributions. The collusive character of the intervention attempt was further evidenced when the original defendants admitted that they are "financing the intervention",² that "the fees and expenses of counsel for the employee-intervenors will be paid by the Foundation,"³ and that Godfrey P. Schmidt, counsel for intervenors, has been for many years a significant member of the team of lawyers working with defendants.⁴

² Defendants' Response to the Motion and Request for Hearing, February 25, 1976, at 1.

³ *Id.*

⁴ Reed Larson, chief executive of both defendants, testified in deposition on February 9, 1976, that Schmidt is one of "a half dozen" or "maybe a dozen" outside counsel who handle most of defendants' cases; "[a]s outside counsel, he is one of the more active ones" (App. Below 309-10). Mr. Schmidt himself asserts that he has given defendants advice and counsel over the years (*id.* at 155-56). As Mr. Rex Reed, chief house counsel for defendant Foundation admitted on deposition, this advice and counsel extended to the instant motion to intervene, on which Messrs. Schmidt and Reed consulted "prior to the time that the intervention was filed" (*id.* at 314). It is noteworthy, too, that Mr. Schmidt conceded that "since 1973, he has been one of

On March 8, 1976, the District Court denied intervention of right on the ground that "movants are adequately represented" (App. 3a), but granted permissive intervention "on the limited issue of whether the plaintiffs in the lawsuits" financed by the Foundation "are union-members employees" (App. 3a-4a). On April 28, 1976, the District Court struck intervenors' answer because "outside the scope of the permissive intervention granted . . ." (App. 5a). On December 17, 1976, the Court of Appeals affirmed both District Court actions in a summary order (App. 2a). The petition for certiorari to review the unanimous actions below only compounds the previous unwarranted impositions on the time of this Court. See note 1, *supra*.

THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO SUBSTANTIAL QUESTION AS TO ANY OF THE CHALLENGED ACTIONS OF THE COURTS BELOW

(1) *The District Court was clearly correct when it held that "movants are adequately represented" by defendants.* What intervenors are seeking to protect is their alleged right to continue to maintain their suits against unions with the assistance of defendants and defendants' counsel who are financed by interested employers. Since defendants and their overlapping counsel are fighting for precisely that same right here, it is inconceivable that they would not be providing inter-

several local counsel and consultants retained by Defendant Foundation to consult to it" (*id.* at 155) and that, as such consultant, he prepared "a lengthy complaint and an extensive brief" concerning the agency shop clause and "participated in the ensuing intra-Foundation discussion and debate for several months" (*id.* at 156). Equally significant, Mr. Schmidt obtained the names of intervenors and their local counsel in their Foundation-financed suits from defendant Foundation and solicited their intervention in that manner (*id.* at 158).

venors the best possible representation of those interests—if only to protect their own identical interests.⁵ The right to support intervenors' suits with funds of interested employers and the right of intervenors to be supported in their suits with funds of interested employers are two sides of the same coin.

Intervenors try to obscure their identity of interest with defendants by the unsubstantiated assertion that “the interests of donees differ from those of donors of legal aid” (Pet. at 11). But the only relevant question here is the alleged common right of donees, donors, employees, the Right to Work Committee and the Foundation to “interested employer” financing of anti-union employee suits—not any additional rights these parties might possess in other unrelated situations. Quite simply, intervenors have no legal rights or interests in this suit which differ in any way from those of the defendants.

(2) Even if it were not immediately apparent from the circumstances of this suit that defendants and intervenors have no separable interest, the collusion of those two groups in initiating and processing this attempted intervention would suffice in and of itself to establish that point. *The defendants are financing the intervention, and a lawyer from their own team is the counsel for the intervenors.* The intervenors are not a new voice, but simply an addition to the chorus of defendants' lawyers. This collusion, in addition to demonstrating the absence of separable interest, is an independent basis for the denial of intervention. As then Judge

⁵ Indeed, intervenors make no claim of the inadequacy of defendant's counsel, nor could they do so in view of the standing of Whitney North Seymour, Thomas S. Jackson, John Kileullen, and Rex Reed, all counsel, along with their firms, for defendants in this case.

Blackmun wrote in 1960, “courts must be on guard against the improper use of the intervention process”; Rule 24 “is not to be taken advantage of where there is collusion . . .” *Kozak v. Wells*, 278 F.2d 104, 113 (8th Cir, 1960)

(3) The denial of intervention of right was also proper because intervenors failed to make “timely application” as required by Rule 24. *The effort at intervention came more than two-and-a-half years after the suit was commenced and just at the time when the matter assumed a posture for decision.* In *National Ass'n for Advancement of Colored People v. New York*, 413 U.S. 345 (1973), four months' delay in intervention was held untimely where, as here, intervenors “knew or should have known of the pendency of the . . . action” (at 366). Certainly, intervenors cannot claim ignorance of the pendency of this action, for not only were defendants intimately connected with the individual suits around the country, but intervenors' own chief counsel was working with the defendants throughout this period and had indeed attempted to file an *amicus* brief in the Court of Appeals in this very case as early as 1974.⁶ Thus, untimeliness is added to adequate representation and collusion as a reason which supports the actions of both courts below in denying intervention of right.

(4) The limited permissive intervention granted intervenors by the District Court here under Rule 24(b)

⁶ Mr. Schmidt, as counsel for the National Association of Orchestra Leaders, attempted to file a brief *amicus curiae* in this case before the Court of Appeals in support of the defendants' petition for mandamus. See note 1, *supra*. The July 8, 1974 Motion for Leave to File included this statement (at 3):

“Movant did not request the consent of any party to this litigation, as permitted by Rule 29, F.R.A.P.; but movant believes that petitioners (Committee and Foundation) and their various attorneys will not oppose the instant application.”

was, if anything, overly generous to intervenors—certainly the collusive nature of the intervention and its untimeliness were both grounds for denying permissive as well as intervention of right. The District Court, nevertheless, granted intervention limited to the “issue of whether plaintiffs in the lawsuits” financed by defendants were union members, and it was clearly entitled to enforce that limitation. *The intervenors have no more right to file an answer that goes beyond the District Court’s limited intervention than they would have to file other papers in contravention of that intervention order or to seek to argue orally other points outside that permissive intervention.*⁷

(5) The intervenor-petitioners predicate a due process argument on the ground that “[t]he disabling permissive intervention allowed to Petitioners by the Courts below binds them under a possible judgment in this case.” Pet. at 15. But where, as here, intervention has been specially limited, “only orders pertaining to the matter for which intervention was permitted would be binding on him [intervenor].” 3B *Moore’s Federal Practice* ¶ 24.16[6], at 671 (1977). Furthermore, petitioners made no effort to withdraw their intervention

⁷ There is no conflict between the instant case and *Stewart-Warner Corp. v. Westinghouse Electric Corporation*, 325 F. 2d 822 (2d Cir. 1963), cert. denied 376 U.S. 944 (1964). The *Stewart-Warner* Court, by a two to one vote, overruled the District Court’s limitations on permissive intervention in order “to permit adjudication of all claims in one forum and in one suit . . .” (at 827); no such consideration is present here. Furthermore, the Second Circuit was obviously not barring all limited permissive intervention; in a more recent decision the Second Circuit stated that it saw “no reason” why a discretionary intervenor might not be subjected to conditions necessary to “efficient conduct of the proceedings.” *Ionian Shipping Co. v. British Law Ins. Co.*, 426 F.2d 186, 191-192 (1970).

once they knew of the limitations placed by the Court thereon; instead they sought unilaterally to expand the limited role granted by the District Court in violation of the Court’s order, and that was the one course not open to them. Finally, if a decision against the Right to Work defendants should, as a practical matter, prevent intervenors from receiving funds from the Right to Work defendants, intervenors still could have no complaint for their contention on this point would have been adequately represented by counsel for defendants (see pp. 5-6 *supra*). *In view of intervenors’ point of view being adequately represented by defendants, as well as the collusive nature of intervenors’ intervention and its untimeliness, the District Court was more than generous to intervenors in granting them even the limited permissive intervention provided in the District Court’s order.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, *et al.*,

Respondents (Plaintiffs),

and

NATIONAL RIGHT TO WORK LEGAL DEFENSE
AND EDUCATION FOUNDATION, INC., *et al.*,

Respondents (Defendants).

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**REPLY BRIEF OF PETITIONERS TO
BRIEF IN OPPOSITION OF RESPONDENTS
(PLAINTIFFS)**

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MICHAEL RODAK, JR., CLERK

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**REPLY BRIEF OF PETITIONERS TO
BRIEF IN OPPOSITION OF RESPONDENTS
(PLAINTIFFS)**

This Reply Brief is submitted pursuant to Rule 24(4)
of the Rules of this Court.

The "Brief in Opposition for Plaintiff Union
Respondents" calls, by way of arguments first raised
therein, for correction, as well as reorientation to the

real issues. This can be accomplished with brevity and without the "unwarranted impositions on the time of this Court" (p. 5)¹ which Respondents solicitously deprecate.

A. In their paragraph numbered "2" (p. 2), Respondents misstate the issue. The real issues are whether Petitioners were entitled to intervention under Rule 24(a) F.R.C.P.; and whether there is any statutory or other warrant for the type of permissive intervention *manqué* allowed by the District Court or for striking Petitioners' Answer simply because it went beyond the feckless intervention granted.

B. The Second Amended Complaint does not allege that Respondents seek an injunction or other relief against "the continuing instigation and financing, by interested employers through the Defendant Committee and Foundation, of . . . suits by union members against their unions" (p. 2). Still, if it did, the application for injunction would lack, as essential parties, the targeted "interested employers", whom the Second Amended Complaint never identified.

"Interested employers" not only have an interest in this controversy, they have an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be inconsistent with equity and good conscience. "Interested employers", as well as Petitioners, are "real parties in interest", as was pointed out in the motion papers presented to the District Court.

¹ Numbers in parentheses signify pages of Respondents' Brief In Opposition; numbers in parentheses followed by a small "a" indicate pages of Petitioners' Appendix.

C. The words, "collusion" or "collusive" (p. 4, *et seq.*), according to all dictionaries, imply either a *secret* agreement or an agreement *to defraud*. The papers submitted below by Petitioners on their application for intervention show that Petitioner-Intervenors never made a secret of Godfrey Schmidt's limited relationship to Defendant Foundation; and that he had no connection at all with Defendant Committee.

The "red herring" of collusion was injected for the first time in this case by "Plaintiffs' Supplemental Opposition to Motion to Intervene", submitted below by counsel for Respondents.² Had the Courts below found collusion, not even the limited permissive intervention allowed would have been granted. Nothing in the Record indicates that the Courts below took seriously Respondents' "collusion" insinuations or regarded them as relevant or significant.

If successful, Respondents' efforts to prevent presentation of the valid and relevant issues, affirmative defenses and counterclaim set forth in Petitioners' Answer (pp. 9a-75a) would result in suppression of what is relevant. The real issue herein is whether a District Court should be allowed to nullify Rule 24(a) F.R.C.P. by granting a merely nominal permissive intervention which makes the Intervenors mere spectators and strips them of the right to defend their *undenied* interests. The irrelevant and artificial thrusts about "collusion" obscure that real issue.

D. That Petitioners are *not* "fighting for precisely the same right" (p. 5) as Defendants below is

² "Plaintiffs Opposition to Motion to Intervene" had been filed January 19, 1976; "Plaintiffs' Supplemental Opposition for Motion to Intervene" was filed May 21, 1976.

demonstrated by a comparison of Intervenor's Answers with Defendants' Answer (pp. 9a-75a). Resorting to metaphor, Respondents say that Intervenor's right and Defendants' right "are two sides of the same coin". The only value of the metaphor is to show, as do the Answers aforesaid, that the two sides of the coin are *not* the same, and in fact are very different.³

E. If, as Respondents claim, "the only relevant question here is the alleged . . . right of donees, donors, employees, the Right to Work Committee and the Foundation to 'interested employer' financing of anti-union suits" (p. 6), one is left to wonder about two indisputable facts:

(i) The Second Amended Complaint does not name as defendant, nor describe, nor identify in any way, a single "interested employer"; nor does it define what Respondents mean by "anti-union". Apparently, the twenty-five lawsuits in other courts listed in the Complaint (pp. 21a-28a) are self-evidently "anti-union"!

(ii) After four years of litigation in this case (most of which concentrated on discovery), neither Plaintiffs, nor their Second Amended Complaint, nor the Courts below ever defined "interested employer".

Pitched against this background lies the limp *ipse dixit* that "intervenor's failed to make 'timely application' for intervention" (p. 7)!⁴ By contrast,

³The conflict of interest between the Defendants and Petitioners emerges into clear light in the still continuing, but already four-year-old, controversy between Plaintiffs and Defendants below concerning disclosure of the names of Foundation's contributors. It is Foundation, not Petitioners, which has refused that disclosure. It is in the interest of Foundation, not the interest of the Petitioners as recipients of the Foundation's legal-aid, which as been advanced by that long struggle about discovery.

⁴On March 4, 1976, Judge Richey said (App. below 207): "I do think we have had this case — why, goodness gracious, it is a 1973 case, and here we still are in a very preliminary stage." On

Respondents have failed to present a "case" or "controversy" under Article III, Section 1 of the Constitution of the United States, since no facts showing violation of law are alleged in the Second Amended Complaint. The latter purveys only unspecific and general conclusions of fact and of law about past, present and future lawsuits *in other courts* to which Respondents' (Plaintiffs') present claims were not presented.

Apart from Petitioners, no one in this case, whether party or Judge, has ever, during four years of litigation, posed or addressed what is now termed the "only relevant question" (p.6), a purely legal question at best. It is a question not even raised by the Second Amended Complaint. What the Second Amended Complaint really demands is an advisory opinion, an answer to an abstract question: "What does 'interested employer' mean?" The Second Amended Complaint contains no specific fact allegation on the subject, nor any fact allegation showing wrong-doing by Defendants. It fails to disclose adequate information as the basis of claim against the Defendant Foundation. It is a series of bare averments that Plaintiffs want relief and are entitled to it.

(footnote continued from preceding page)

March 8, 1976, Mr. Silard, of counsel for plaintiffs, said (App. below 223) "...I would like . . . to amend the pleading [complaint] so that I am not barred on any technical basis . . . (App. below 224) I formally move to amend the pleadings to add the allegation that they [defendants] are an association of employers. . . . The Court. Well, I think what you had better do, Mr. Silard, is to make your motion in the usual course and allow the defendants [not the intervenors] to respond to it Mr. Silard Our clients are very unhappy. It has been three years since we filed this suit for them [on May 1, 1973] [W]e are essentially not one step closer, or not many steps closer to the judgment." (App. below 225).

In any event, the Court below did not rule or suggest that Petitioners' application for intervention was untimely.

F. Equally unavailing is another metaphor used in Respondents' Brief: "The Intervenors are not a new voice but simply an addition to the chorus of defendants' lawyers" (p. 6). On the basis of this simile, the "new voice" sings one song (Intervenors' Answer) and "the chorus of defendants' lawyers" sings, discordantly, another and different song (Defendants' Answer).

G. The *Stewart-Warner* case (p. 8)⁵ admittedly reveals the Second Circuit's intention "...to permit adjudication of all claims in one forum and in one suit..." That is the reason why Intervenors want to be heard on the basis of their Answer. Respondents' effort to distinguish that case is wasted. Respondents' reliance (p. 8) on *Ionian Shipping Co. v. British Law Ins. Co.*, 426 F.2d 186 (2nd Cir. 1970) is misplaced, as the Second Circuit there speaks to intervenors as plaintiffs, *not*, as herein, to intervenors as defendants.

H. Petitioners did not predicate their due process argument on the sole ground that the "disabling permissive intervention allowed... by the Courts below binds them under a possible judgment in this case". Petitioners' main reliance was upon the absence of due process in denying intervention *of right* in violation of Rule 24(a) F.R.C.P., and of striking their Answer arbitrarily. In any event, Respondent-Plaintiffs admittedly seek an injunction against the Defendants (p. 2) and summary judgment⁶ (p. 3). If the District Court grants summary

⁵ *Stewart-Warner Corp. v. Westinghouse Electric Corp.*, 325 F.2d 882 (2nd Cir. 1963), cert. denied, 376 U.S. 944 (1964).

⁶ The Respondents' Brief (pp. 3-4) refers to the pendency before the District Court of an order to show cause (issued *sua sponte* by the District Court) why summary judgment should not be entered for Respondents. Argument on this motion, as well as others now pending below, has been fixed for April 26, 1977.

judgment or enjoins financing of employee suits by Foundation, that would cut off legal aid to Petitioners — legal aid in which they have an *uncontroverted* interest, and which alone makes their lawsuits possible. Before being denied that interest, and before their lawsuits are thus, for all practical purposes, aborted, Petitioners are entitled to such a hearing as due process requires. The injunction Respondents seek (p. 2), whether or not constituting an order "pertaining to the matter for which intervention was permitted" (p. 8), would necessarily, and for all practical purposes, injure Petitioners and prejudice their interests. This is true even if there were doubt that the injunction order would be binding upon Petitioners as permissive intervenors. (p. 8)

I. Petitioners cite *Kozak v. Wells*, 278 F.2d 104, (8th Cir. 1960) in their Petition. Respondents rely on a *dictum* in that case (p. 7), as the Court of Appeals in that case found no collusion (278 F.2d at 114). *Kozak*, however, emphasizes the error of the District Court in striking Petitioners' Answer (278 F.2d at 109), in denying intervention of right (278 F.2d at 108) and in holding that Petitioners are adequately represented (278 F.2d at 109-110).

The remaining parts of Respondents' Brief simply *assume*, as does the Second Amended Complaint, wrongdoing in Defendants and in unidentified employers whom they *assume* to be "interested".

CONCLUSION

For the reasons set forth hereinabove, and in the original Petition, a writ of certiorari should be granted; or in the alternative, Petitioners pray this Court (in the interest of speedy justice and due process) to exercise its powers of supervision over all federal courts by remanding this case to the District Court with instructions to grant Petitioners intervention *of right* and to reinstate their Answer.

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